Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSE ERASMO DE LA ROSA,
Petitioner,

v.

ERIC J. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For more than 25 years, the Board of Immigration Appeals (BIA) held that a legal permanent resident (LPR) who is deportable due to a criminal conviction could seek a discretionary waiver of removal under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), provided that the conviction also would have constituted a waivable basis for exclusion. In 2005, the BIA abruptly changed course, adding a requirement that the LPR be deportable under a statutory provision that used "similar language" to an exclusion provision. Deportable LPRs who departed and reentered the United States after their conviction, however, may seek Section 212(c) relief under a longstanding "*nunc pro tunc*" procedure that does not turn on similar language between deportation and exclusion provisions. Thus, under the BIA's current view, an LPR who pled guilty to an offense that renders him both deportable and excludable, but under provisions that use dissimilar phrasing, will be eligible for Section 212(c) relief from deportation if he departed and reentered the United States after his conviction, but ineligible if he did not depart. The circuits are split three ways on the lawfulness of the BIA's new interpretation.

The question presented is:

Whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, but who did *not* leave the United States between his conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the INA.

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OPINIONS BELOW

The court of appeals issued its decision and entered judgment on August 20, 2009. The decision of the court of appeals is reported at 579 F.3d 1327 and reproduced at App. 1a-28a.

The oral decision of the Immigration Judge ordering Petitioner deported to the Dominican Republic is unreported. App. 33a-36a. The decision of the Board of Immigration Appeals affirming the deportation order is likewise unreported. App. 29a-31a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be ... deprived of life, liberty, or property, without due process of law[.]"

2. The following provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, are set forth in relevant part in the Appendix hereto:

a. 8 U.S.C. § 1101(a)(43) (App. 55a-56a);

b. 8 U.S.C. § 1182(a) (App. 53a);

c. 8 U.S.C. § 1182(c) (1996) (repealed Apr. 1, 1997) (App. 54a); and

d. 8 U.S.C. § 1227(a) (App. 54a-55a).

3. 8 C.F.R. § 1212.3(f)(5) is reproduced at App. 57a.

INTRODUCTION

This case presents an important question of immigration law on which the courts of appeals have split three ways. Prior to 2005, the BIA had repeatedly held that individuals in Petitioner De la Rosa's position could seek discretionary relief from removal under former Section 212(c) of the Immigration and Nationality Act (INA). In Petitioner's own case, government

counsel conceded that Petitioner appeared to be "eligible" for relief under Section 212(c). App. 43a.[1]

In 2005, however, reacting to this Court's reaffirmance of the availability of Section 212(c) relief to certain aliens (*see INS* v. *St. Cyr*, 533 U.S. 289, 294-298 (2001)), the BIA sought to curtail Section 212(c) relief in a way that disqualified numerous previously eligible individuals, including Petitioner. Purporting to interpret a 2004 regulation promulgated to implement *St. Cyr*, the BIA ruled that deportable lawful permanent residents (LPRs) who had *not* traveled abroad after their convictions could only seek discretionary relief if the government charged them under a deportation provision in the INA that used *similar language* to an exclusion provision. *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005). The BIA has acknowledged that *Blake* was a "change in law." *E.g.*, *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb. 22, 2008).

The practical result was suddenly to foreclose Section 212(c) relief for large numbers of LPRs whose at-

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[1] Before April 1, 1997, the INA distinguished between deportation proceedings, applicable to individuals already present in the United States, and exclusion proceedings, applicable to individuals seeking to enter the United States. The Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 304, 110 Stat. 3009-548, 3009-589 (1996) (IIRIRA), replaced both with "removal" proceedings and also replaced the term "excludable" with "inadmissible." Nonetheless, the statutory distinction between the two categories of individuals remains. *Compare* 8 U.S.C. § 1182(a) (defining class of inadmissible individuals) *with* 8 U.S.C. § 1227(a) (defining class of deportable individuals). The terms "deportation" and "exclusion" and their variants are used where necessary to the analysis under former Section 212(c).

tachment to the United States was so strong that they had not left the country at all following their conviction. Meanwhile, under an established BIA practice that Congress has long accepted, Section 212(c) relief remains available to similarly situated LPRs who *did* leave the country following their conviction, reentered the United States, and were subsequently placed in removal proceedings. Such individuals have been able to seek Section 212(c) relief "*nunc pro tunc*" for nearly sixty years, as long as their conviction was for an offense that would have rendered them inadmissible upon reentry.

The Second Circuit has correctly rejected the BIA's new position, because it creates an irrational distinction inconsistent with equal protection. The Ninth Circuit, in a sharply divided en banc decision, held that Section 212(c) does not apply to deportable LPRs at all—a position that neither the BIA nor the government has endorsed. The other circuits to address the question, including the Eleventh Circuit in this case, have affirmed the BIA's new approach.

Although Section 212(c) was repealed in 1996, it remains of critical importance to numerous longstanding residents of this country, many of whom—like Petitioner De la Rosa—are rehabilitated, have worked hard for decades, are supported by U.S. citizen family members, have U.S. citizen children, and have made valuable contributions to their communities. The BIA would now deny them the right to apply for relief that this Court reaffirmed in *St. Cyr*, based solely on the arbitrary nature of their travel history. The fact that Mr. De la Rosa did *not* leave the United States after 1995 is no reason to deprive him of an opportunity to seek discretionary relief from removal—relief that he would in all likelihood receive were he allowed to apply for it.

This Court should grant certiorari to review the judgment of the Eleventh Circuit and bring much-needed uniformity to this important question.

STATEMENT

A. Factual Background

Petitioner Jose Erasmo De la Rosa, a native of the Dominican Republic, entered the United States through New York as an LPR in 1989, when he was sixteen years old. App. 2a-3a. He resided continuously in the United States for nearly twenty years. *See* App. 39a. He is married and is the father of three U.S. citizen children. Mr. De la Rosa owns a home in Orlando, Florida and has had a consistent work history. *See id.* His parents and siblings all live in the Orlando area; his father and five of his six siblings are U.S. citizens, and his mother and eldest brother are LPRs. *See id.*

In 1993, when Mr. De la Rosa was twenty years old, he had a relationship with a girlfriend who was fourteen years old. C.A. A.R. 69-70. According to the charge sheet filled out by police, the two had sexual intercourse twice during an approximately eight month relationship. *Id.* The charge sheet does not assert any coercion or violence. In 1995, Mr. De la Rosa pleaded *nolo contendere* to "committing a lewd act upon a child." App. 3a (citing Fla. Stat. § 800.04(3)). Mr. De la Rosa was sentenced to three years of supervised probation and served no jail time. C.A. A.R. 67. In 1998, Mr. De la Rosa applied for naturalization.

On May 17, 2004, the government placed Mr. De la Rosa in removal proceedings, charging that his 1995 conviction qualified as: (1) an aggravated felony relating to "sexual abuse of a minor" under Section 237(a)(2)(A)(iii) of the INA (8 U.S.C.

§ 1227(a)(2)(A)(iii)); and (2) a crime of domestic violence or child abuse under Section 237(a)(2)(E)(i) (8 U.S.C. § 1227(a)(2)(E)(i)). App. 3a.

Mr. De la Rosa was released on bond while his removal proceedings were pending. An immigration judge (IJ) rejected the government's appeal from the bond order, finding that Mr. De la Rosa "has lived in and established positive ties in the Orlando community for many years ... has the support of his family in the United States, a good work history, and it appears that *[he] has been rehabilitated.*" App. 39a (emphasis added).

At an initial hearing on February 15, 2005, Mr. De la Rosa conceded his removability and applied for discretionary relief from removal under Section 212(c). App. 43a. Government counsel stated that Mr. De la Rosa "appears eligible" for Section 212(c) relief. *Id.* The IJ scheduled a merits hearing for March 1, 2007. During the intervening two years, the BIA radically altered its approach to Section 212(c).

B. Availability Of Discretionary Relief Before 2005

Prior to its repeal in 1996, Section 212(c) provided: "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General[.]" 8 U.S.C. § 1182(c).

Although the terms of Section 212(c) envision relief only for *excludable* LPRs, it has long been applicable to persons who, like Mr. De la Rosa, are *deportable* due to convictions that would also render them excludable.

1. Section 212(c)'s predecessor was the Seventh Proviso to Section 3 of the Immigration Act of 1917, which permitted a discretionary waiver of exclusion for "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years." Pub. L. No. 64-301, 39 Stat. 874, 878. "Although that provision applied literally only to exclusion proceedings, and although the deportation provisions of the statute did not contain a similar provision, the INS relied on [the Seventh Proviso] to grant relief *in deportation proceedings* involving aliens who had departed and returned to this country after the ground for deportation arose." *St. Cyr*, 533 U.S. at 294 (emphasis added). The law treated the deportable LPR as if he had been placed in exclusion proceedings upon reentry, such that relief was available "*nunc pro tunc*." *Matter of L-*, 1 I. & N. Dec. 1, 5-6 (Att'y Gen. 1940).[2]

2. Section 212 of the Immigration and Nationality Act of 1952 "replaced and roughly paralleled § 3 of the 1917 Act." *St. Cyr*, 533 U.S. at 294. Its discretionary relief provision, Section 212(c), closely tracked the Seventh Proviso. The BIA soon ruled that Section 212(c) permitted relief for LPRs in deportation proceedings who had traveled abroad after their conviction and before being placed in deportation proceedings. *Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956). The BIA also made clear that, if Section 212(c) "is exercised to waive a ground of inadmissibility based upon a criminal con-

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[2] The Attorney General determined that Congress did not intend the Seventh Proviso to operate in a "capricious and whimsical" fashion to deny an eligible LPR relief merely because the government had failed to place the LPR in exclusion proceedings upon reentry. *L-*, 1 I. & N. Dec. at 5.

viction, a deportation proceeding cannot thereafter be properly instituted based upon the same criminal conviction." *Id.* at 275.

The BIA initially refused to permit deportable LPRs who had *not* traveled abroad after their conviction to seek Section 212(c) relief. *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 697-698 (BIA 1971). In 1976, the Second Circuit rejected that approach, ruling that LPRs who had traveled abroad and those who had not were "in like circumstances, but for irrelevant and fortuitous factors," and therefore equal protection required that they be "treated in a like manner." *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). The Second Circuit noted that the government had proffered no reason to distinguish between LPRs based on a "failure to travel abroad following ... conviction" and concluded that "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return[.]" *Id.* The BIA and all of the courts of appeals followed *Francis*.[3]

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[3] *See St. Cyr*, 533 U.S. at 295; *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976); *see also Anwo* v. *INS*, 607 F.2d 435, 436 n.3 (D.C. Cir. 1979) (per curiam); *Lozada* v. *INS*, 857 F.2d 10, 11 n.1 (1st Cir. 1988); *Katsis* v. *INS*, 997 F.2d 1067, 1070 (3d Cir. 1993); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 248 n.1 (4th Cir. 1981); *Carrasco-Favela* v. *INS*, 563 F.2d 1220, 1221 n.3 (5th Cir. 1977) (per curiam); *Rodriguez-Reyes* v. *INS*, 1993 WL 8150, at *2 (6th Cir. Jan. 15, 1993) (unpublished); *Variamparambil* v. *INS*, 831 F.2d 1362, 1364 n.1 (7th Cir. 1987); *Varela-Blanco* v. *INS*, 18 F.3d 584, 586 (8th Cir. 1994) (per curiam); *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981), *overruled*, *Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam); *Vissian* v. *INS*, 548 F.2d 325, 328 n.2 & n.3 (10th Cir. 1977); *Yeung* v. *INS*, 76 F.3d

Consequently, for nearly twenty years before Mr. De la Rosa pled guilty, Section 212(c) relief was available to deportable LPRs who *could have* sought relief *nunc pro tunc* had they left the United States and returned, regardless of whether they had actually done so. *See, e.g., Cabasug* v. *INS*, 847 F.2d 1321, 1327 (9th Cir. 1988) (Wallace, J., concurring) (explaining that it would violate equal protection "to distinguish between *aliens who had committed the same crime* on the basis of whether they traveled abroad recently" (emphasis added)).

Although *Francis* made Section 212(c) relief available to many deportable LPRs, it did not apply to LPRs who were deportable for convictions that *did not* make them inadmissible. Persons in that situation would not have been eligible for Section 212(c) relief *nunc pro tunc* even if they *had* traveled abroad, and there was accordingly no irrational distinction in denying relief in such cases. *See, e.g., Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 574-575 (BIA 1996) (stating that Section 212(c) relief was not available "to an alien in deportation proceedings when that same alien would not have occasion to seek such relief were he in exclusion proceedings instead").

That limitation came to be known as the "statutory counterpart" rule: Section 212(c) relief was available in removal proceedings if the LPR was deportable for a conviction that fell under a "counterpart" exclusion

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337, 340 n.4 (11th Cir. 1995); *accord Tapia-Acuna* v. *INS*, 449 U.S. 945 (1980) (vacating and remanding in light of Solicitor General's change of position); *Abebe*, 554 F.3d at 1214-1215 (Thomas, J., dissenting) (noting government's concession in *Tapia-Acuna* that *Francis* was correct).

provision. Because most crimes that are grounds for deportation are also grounds for exclusion, the statutory counterpart rule was satisfied by all but a limited group of LPRs—generally, only those deportable for certain firearms convictions[4] and entry without inspection.[5] The Attorney General stated as much in 1991, when he identified only "two grounds for deportation [that] have no analogue in the grounds for exclusion," namely entry without inspection and firearms offenses. *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991); *see also* Aleinikoff, Martin, & Motomura, *Immigration: Process & Policy* 703-704 (3d ed. 1995) ("The two most significant deportation grounds without comparable exclusion grounds are entry without inspection and firearms violations.").

3. In 1996, Congress repealed Section 212(c). Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-548, 3009-597 (1996) (IIRIRA). In 2001, this Court held that the repeal was prospective only and that LPRs who were deportable on account of convictions obtained through guilty pleas prior to April 1, 1997 (IIRIRA's

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[4] *See, e.g.*, *Drax* v. *Reno*, 338 F.3d 98, 101, 108-109 (2d Cir. 2003); *Cato* v. *INS*, 84 F.3d 597, 600 (2d Cir. 1996); *Gjonaj* v. *INS*, 47 F.3d 824, 825, 827 (6th Cir. 1995); *Campos* v. *INS*, 961 F.2d 309, 311-314 (1st Cir. 1992); *Matter of Esposito*, 21 I. & N. Dec. 1, 9-10 (BIA 1995); *Matter of Montenegro*, 20 I. & N. Dec. 603, 605-606 (BIA 1992); *Matter of Granados*, 16 I. & N. Dec. 726, 728-729 (BIA 1979).

[5] *See, e.g.*, *Farquharson* v. *U.S. Attorney General*, 246 F.3d 1317, 1325 (11th Cir. 2001); *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 948, 952 (7th Cir. 1993); *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 281, 286-287 (Att'y Gen. 1991).

effective date) could still seek Section 212(c) relief. *See St. Cyr*, 533 U.S. at 326.

In 2004, the Department of Justice (DOJ) promulgated a regulation implementing *St. Cyr* and setting out the criteria for Section 212(c) relief. The regulation included a statutory counterpart requirement. 8 C.F.R. § 1212.3(f)(5) ("An application for relief under former section 212(c) of the Act shall be denied if ... [t]he alien is deportable ... on a ground which does not have a statutory counterpart in section 212 of the Act.").

4. Up to and including 2004, the BIA repeatedly held that persons deportable for certain "aggravated felonies" (*see* 8 U.S.C. § 1227(a)(2)(A)(iii)) satisfied the "statutory counterpart" requirement, generally because the crime of conviction was also a "crime involving moral turpitude" that would render the LPR inadmissible under Section 212(a)(2)(A)(i). Although the provisions governing inadmissibility did not list aggravated felonies as a basis for exclusion, the BIA held that a Section 212(c) waiver was "not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, 'convicted of an aggravated felony.' " *Matter of Meza*, 20 I. & N. Dec. 257, 259 (BIA 1991). The BIA accordingly ruled that LPRs could seek waivers of deportation for aggravated felony convictions, including "crimes of violence" under 8 U.S.C. § 1101(a)(43)(F)[6]

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[6] *See, e.g., Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-591 (BIA 1992) (noting that an LPR convicted of attempted murder "is not barred from applying for section 212(c) relief"); *Matter of A-A-*, 20 I. & N. Dec. 492, 500-501 (BIA 1992) (concluding that an LPR convicted of murder was not disqualified from seeking Section 212(c) relief on that basis); *Matter of S-Lei*, No. A38139424 (BIA May 27, 2004) (App. 79a-80a) (affirming grant of

and "sexual abuse of a minor" under § 1101(a)(43)(A).[7] The courts of appeals likewise noted the availability of Section 212(c) relief to persons convicted of such crimes. *See e.g.*, *Hem* v. *Maurer*, 458 F.3d 1185, 1187-1189 (10th Cir. 2006) (crime of violence); *De Araujo* v.

Section 212(c) relief to an LPR convicted of attempted robbery, a crime of violence); *Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003) (affirming a Section 212(c) waiver of a conviction for voluntary manslaughter, a crime of violence); *see also Matter of Caro-Lozano*, 2004 WL 1398661 (BIA Apr. 22, 2004) (reaching the merits of a Section 212(c) application in a crime of violence case); *Matter of Hussein*, 2004 WL 1059601 (BIA Mar. 15, 2004) (remanding for consideration of Section 212(c) relief where conviction was a crime of violence); *Matter of Martinez*, 2004 WL 1167082 (BIA Feb. 18, 2004) ("[I]t does appear that Section 212(c) could waive the burglary offense[.]"); *Matter of Loney*, 2004 WL 1167256 (BIA Feb. 10, 2004) (an LPR convicted of a crime of violence was "not precluded" from seeking Section 212(c) relief where the crime was also a crime involving moral turpitude); *Matter of Orrosquieta*, 2003 WL 23508672 (BIA Dec. 19, 2003) (recognizing that a petitioner deportable for extortion, a crime of violence, would be "entitled" to seek Section 212(c) relief); *Matter of Munoz*, No. A35279774, 28 Immig. Rptr. B1-1 (BIA Aug. 7, 2003) (App. 59a-69a) (remanding for consideration of Section 212(c) relief where the crime of violence was also a crime involving moral turpitude); *Matter of Rowe*, No. 37749964 (BIA May 9, 2003) (App. 75a-78a) (rejecting government's argument that a crime of violence was not waivable).

[7] *See, e.g.*, *Hussein*, 2004 WL 1059601 (an LPR convicted of indecency with a child was eligible for Section 212(c) relief because he could have been excluded due to a crime involving moral turpitude); *Matter of Rodriguez-Symonds*, 2004 WL 880246 (BIA Mar. 9, 2004) (remanding for consideration of whether an LPR convicted of a lewd act upon child was eligible for Section 212(c) relief because the conviction was also a crime involving moral turpitude); *Matter of Ashley*, 2003 WL 23521830 (BIA Nov. 4, 2003) (noting apparent Section 212(c) eligibility for an LPR convicted of a sexual offense against a child).

Gonzales, 457 F.3d 146, 154-155 (1st Cir. 2006) (crime of violence); *United States* v. *Ortega-Ascanio*, 376 F.3d 879, 886-887 (9th Cir. 2004) (sexual battery); *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042, 1051 (9th Cir. 2004) (burglary). This Court also recognized the importance of Section 212(c) in aggravated felony "crime of violence" cases. *St. Cyr*, 533 U.S. at 295-296 & n.4.[8]

C. The BIA Changes Course In 2005

On April 6, 2005—fewer than two months after the government conceded that Mr. De la Rosa appeared eligible for Section 212(c) relief—the BIA, purporting to interpret the 2004 DOJ regulation, abruptly changed the rules. In *Blake*, the BIA decided that an LPR who was deportable for a "sexual abuse of a minor" aggravated felony was categorically ineligible for Section 212(c) relief, regardless of whether the crime would provide a basis for inadmissibility as a crime involving moral turpitude. 23 I. & N. Dec. at 727-728. Without addressing its numerous decisions upholding discretionary waivers in similar circumstances, the BIA held that the "statutory counterpart" requirement could only be satisfied if the LPR was deportable under a

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[8] Although Congress imposed limits on Section 212(c) relief prior to its 1996 repeal, Congress never sought to limit it to excludable LPRs only. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 4978, 5052 (providing that LPRs convicted of aggravated felonies could seek Section 212(c) relief only if they did not serve a term of imprisonment of five years or more); 136 Cong. Rec. S6586, S6604 (daily ed. May 18, 1990) (statement of Sen. Dole) ("Section 212(c) provides relief from exclusion, and by court decision from deportation[.] This discretionary relief is obtained by numerous excludable and deportable aliens[.]").

subsection of INA § 237 that was *phrased* similarly to an inadmissibility subsection in INA § 212(a). *Id.* at 728. Purporting to rest its conclusion on decisions of the Second Circuit, the BIA barred the LPR in *Blake* from applying for relief because the words "sexual abuse of a minor" do not appear in any inadmissibility provision. *Id.* at 728-729. The BIA did not consider whether Blake's conviction would render him excludable and therefore eligible to seek Section 212(c) relief *nunc pro tunc* had he left the country and returned. Shortly thereafter, the BIA applied the same reasoning to "crime of violence" aggravated felonies. *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (BIA 2005).

The BIA acknowledged that *Blake* was a retroactive change in its Section 212(c) jurisprudence—a fact that was confirmed by the BIA's later reversal of decisions to grant relief under the BIA's prior (correct) approach to Section 212(c). In one case, the BIA itself had affirmed an IJ's decision granting relief to an LPR convicted of a "sexual abuse of a minor" crime, but then vacated its decision on the government's motion, referring to *Blake* as "a *change in law* that appears to preclude a grant of 212(c) relief." *Cardona*, 2005 WL 3709244; *see also Matter of Gomez-Perez*, 2006 WL 901334 (BIA Mar. 1, 2006) (vacating IJ's decision to grant Section 212(c) waiver because LPR is "no longer eligible for relief"), *appeal docketed*, No. 07-72569 (9th Cir. June 27, 2007); *Matter of Rangel-Zuazo*, No. A90640428 (BIA May 25, 2005) (App. 71a-73a) (reversing IJ's decision to grant relief because "intervening precedent renders the respondent statutorily ineligible for section 212(c) relief"), *appeal docketed*, No. 07-72316 (9th Cir. June 11, 2007); *Matter of Banuelos-Delena*, 2006 WL 901335 (BIA Mar. 2, 2006) (reversing IJ's de-

cision to grant Section 212(c) waiver based on "intervening Board precedent").

D. The Circuit Split

The courts of appeals have divided three ways in response to *Blake*. Although the BIA claimed to base *Blake* on Second Circuit precedent, that court reversed the BIA in *Blake* itself. *Blake* v. *Carbone*, 489 F.3d 88, 103 (2d Cir. 2007). In 2008, the Second Circuit heard 28% of the total number of appeals from the BIA. *See* Judicial Business of the United States Courts: 2008 Annual Report of the Director, Table B-3 (2009), *at* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf (2008 Annual Report). Eight other courts of appeals, which together heard 25% of all appeals from the BIA (*id.*), have affirmed the *Blake* rule.[9] And the Ninth Circuit, which heard 45% of the appeals from the BIA (*id.*), recently discarded *Francis* altogether, ruling that Section 212(c) relief is unavailable to deportable LPRs—a position neither the government nor the BIA advocated. *Abebe* v. *Mukasey*, 554 F.3d 1203, 1207 (9th Cir.) (en banc) (per curiam), *reh'g and full court reh'g en banc denied*, 577 F.3d 1113 (9th Cir. 2009).[10]

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[9] *Kim* v. *Gonzales*, 468 F.3d 58, 63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 167-168 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 368-369 (5th Cir. 2007); *Koussan* v. *Holder*, 556 F.3d 403, 412-414 (6th Cir. 2009), *reh'g and reh'g en banc denied* (May 29, 2009); *Valere* v. *Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007); *Vue* v. *Gonzales*, 496 F.3d 858, 862-863 (8th Cir. 2007); *Falaniko* v. *Mukasey*, 272 Fed. Appx. 742, 746-748 (10th Cir. 2008) (unpublished); App. 25a-28a.

[10] The Ninth Circuit in *Abebe* suggested that LPRs could still seek relief under the 2004 regulation (*see* 554 F.3d at 1207), and

E. Proceedings Below

In 2007, at the merits hearing on Mr. De la Rosa's Section 212(c) application, the government argued that Mr. De la Rosa was categorically ineligible for Section 212(c) relief based on the BIA's *Blake* decision. App. 44a. The IJ agreed and ordered Petitioner removed. App. 36a. The BIA affirmed. App. 31a.

Mr. De la Rosa sought review in the Eleventh Circuit and moved to stay his order of removal; the government cross-moved for summary affirmance. The court of appeals found that no "binding precedent" directly resolved the case and denied the government's motion for summary affirmance, but it also refused to stay Mr. De la Rosa's removal order. App. 41a-42a. The government removed Mr. De la Rosa to the Dominican Republic on or about October 16, 2008.[11]

The court of appeals summarized Mr. De la Rosa's arguments on the merits as follows: (1) the BIA's decision violated his due process right to equal protection of the laws; and (2) the BIA's decision in *Blake* departed from prior agency and federal court precedent, which permitted LPRs convicted of aggravated felonies that are crimes involving moral turpitude to apply for Section 212(c) relief. App. 19a-22a. The government did not deny that Mr. De la Rosa's conviction was for a crime involving moral turpitude that would provide a basis for inadmissibility. Resp. C.A. Br. 12.

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the BIA has agreed (*Matter of Moreno-Escobosa*, 25 I. & N. Dec. 114, 116-117 (BIA 2009)).

[11] Mr. De la Rosa's removal does not moot his Section 212(c) request. *See, e.g.*, *Spina* v. *DHS*, 470 F.3d 116, 124-125 (2d Cir. 2006); *Moore* v. *Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001).

The Eleventh Circuit denied Mr. De la Rosa's petition for review. The court recognized that *Blake* was a "watershed moment in § 212(c) jurisprudence." App. 12a. Nonetheless, the court stated that *Blake* "did not represent a departure from prior BIA practice" (App. 19a) and concluded that "De la Rosa's implicit equal protection argument fails" (App. 28a). The panel acknowledged the "three-way circuit split" on the issue. App. 17a.

REASONS FOR GRANTING THE PETITION

Section 212(c) continues to be an important source of relief for numerous legal permanent residents. *See St. Cyr*, 533 U.S. at 296 n.6. In the four and one-half years since *Blake*, the issue has arisen in over 120 cases and produced published opinions in almost every circuit. App. 45a-52a (listing representative circuit and BIA cases in which *Blake* or its progeny have been addressed). Ten circuits, which overall hear 98% of the petitions for review from the BIA (*see* 2008 Annual Report at Table B-3) are irreconcilably split three ways on the proper application of Section 212(c) to LPRs deportable as a result of an aggravated felony conviction. This Court's guidance is urgently needed to restore a uniform application of Section 212(c).

The BIA's novel and unprecedented reinterpretation of the statutory counterpart test in *Blake*—ostensibly based on a 2004 regulation designed to implement this Court's ruling in *St. Cyr*—was in fact an evident effort to undermine *St. Cyr* and accomplish through agency and judicial decision what Congress had *not* done through legislation. The BIA's new approach, ratified by the Eleventh Circuit, creates an arbitrary and capricious distinction that is inconsistent with the settled interpretation of Section 212(c) and

resurrects the unconstitutional practice of discriminating between similarly situated LPRs on the irrelevant basis of travel history. It also improperly gives retroactive effect to an (erroneous) interpretation of the 2004 regulation. The Court should grant certiorari and reverse the judgment of the Eleventh Circuit.

I. THE THREE-WAY CIRCUIT SPLIT ON THE APPLICATION OF SECTION 212(c) TO DEPORTABLE LEGAL PERMANENT RESIDENTS IS DEEPLY ENTRENCHED AND THE ISSUE HAS FULLY PERCOLATED

Since the BIA's 2005 decision in *Blake*, ten courts of appeals have considered whether and under what circumstances an LPR who is deportable on the basis of an "aggravated felony" conviction is eligible for Section 212(c) relief. In answering this question, the courts of appeals have split three ways. App. 17a (acknowledging the "three-way circuit split").

First, the Second Circuit has recognized that the BIA's decision in *Blake* revived the equal protection problem—first identified in *Francis*—of giving *worse* treatment to LPRs who had *not* departed the United States. *Blake* v. *Carbone*, 489 F.3d at 102-104. To cure the BIA's constitutional violation, the Second Circuit restored the law to its pre-2005 posture: Section 212(c) relief is available if the "particular offense" that rendered the LPR deportable "would render a similarly situated [LPR] excludable." *Id.* at 103. As the Second Circuit observed, "what makes one alien similarly situated to another is his or her act or offense, which is captured in the INA as either a ground of deportation or exclusion." *Id.* at 104 (explaining that equal protection principles "require[] [the court] to examine the circumstances of the deportable alien, rather than the language Congress used to classify his or her status").

The Second Circuit left to the BIA in the first instance the task of determining whether a particular aggravated felony would render an LPR excludable. *Id.*[12]

Second, eight other courts of appeals, including the Eleventh Circuit below, affirmed the BIA's formulaic approach in *Blake*. Instead of determining whether the underlying offense would also make the deportable LPR inadmissible, those circuits compare only the words used in the particular deportation provision charged by the government to the words used in the inadmissibility provisions of Section 212(a). *See, e.g.*, *Caroleo* v. *Gonzales*, 476 F.3d 158, 164-165 (3d Cir. 2007). Under this "rather mechanical reading of the law" (*Kim* v. *Gonzales*, 468 F.3d 58, 63 (1st Cir. 2006)), Section 212(c) relief is only available if one of the inadmissibility provisions uses language that is substantially identical to the deportation provision charged. *E.g.*, App. 24a. Because the inadmissibility provisions do not use the words "sexual abuse of a minor" or "crime of violence," LPRs who are charged as deportable under those provisions are held categorically ineligible for a waiver of removal, even if the underlying criminal conviction would render them inadmissible for having committed a "crime involving moral turpitude." *See, e.g.*, *Caroleo*, 476 F.3d at 164-165.

However, if LPRs with such convictions leave the country, they *can* seek Section 212(c) relief—either

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[12] Judges in other circuits have praised the Second Circuit's reasoning. *See, e.g.*, *Abebe*, 554 F.3d at 1217-1219 (Thomas, J., joined by Pregerson, J., dissenting); *Vue*, 496 F.3d at 863 (Bye, J., concurring); *Abebe* v. *Gonzales*, 493 F.3d 1092, 1108-1109 (9th Cir. 2007) (Berzon, J., concurring), *vacated*, *Abebe* v. *Mukasey*, 514 F.3d 909 (9th Cir. 2008).

upon return if they are charged as inadmissible or *nunc pro tunc* if they are charged as deportable—as long as their conviction is for a crime that would make them inadmissible, such as a crime involving moral turpitude. *See G-A-*, 7 I. & N. Dec. at 276; *see also Lovan* v. *Holder*, 574 F.3d 990, 996 & n.5 (8th Cir. 2009) (noting that under the *nunc pro tunc* analysis, "the focus is on whether the [LPR] when he returned from a trip abroad was in fact excludable *for any reason*, including prior conviction of a crime involving moral turpitude").[13]

Third, the Ninth Circuit (in a fractured en banc decision) recently overruled decades of agency decisions and its own precedent to hold that Section 212(c) does not apply to deportable LPRs at all. *Abebe*, 554 F.3d at 1207. Under that view, Section 212(c) relief should not even be available as a *nunc pro tunc* correction for deportable LPRs who traveled abroad between their convictions and the initiation of deportation proceedings. As the concurring and dissenting opinions observed, the Ninth Circuit majority failed to observe *stare decisis*, ignored consistent agency practice applying Section 212(c) relief to deportable LPRs, and disregarded Congress's acceptance of that settled construction of the statute. *See id.* at 1209-1211 (Clifton, J., concurring); *id.* at 1213-1217 (Thomas, J., dissenting). Seven judges dissented from the Ninth Circuit's denial of

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[13] Although eight circuits have adopted *Blake*, their number is misleading in terms of the significance of the present three-way circuit split. In 2008, those circuits heard only 25% of the total number of petitions for review from the BIA, whereas the Second Circuit alone heard 28%. *See* 2008 Annual Report at Table B-3.

Abebe's request for full court rehearing en banc. *Abebe* v. *Holder*, 577 F.3d 1113 (9th Cir. 2009).[14]

II. THE ELEVENTH CIRCUIT AND THE BIA INCORRECTLY AND UNCONSTITUTIONALLY RESTRICTED THE SCOPE OF SECTION 212(c) RELIEF

The Eleventh Circuit was correct in one respect: the BIA's *Blake* decision "proved to be a watershed moment in [Section] 212(c) jurisprudence." App. 12a. Before 2005, the BIA consistently held that an LPR deportable on the basis of an aggravated felony conviction for "sexual abuse of a minor" or a "crime of violence" was eligible for Section 212(c) relief from removal if the underlying conviction would have been a basis for inadmissibility (*e.g.*, as a "crime involving moral turpitude" under INA § 212(a)(2)(A)(i)). *See supra* nn.6-7.

In *Blake*, however, the BIA sought to change the law retroactively by eliminating Section 212(c) relief for LPRs who were charged under a deportation provision that used language that was not similar to the language of an inadmissibility provision. By doing so, the BIA (and the Eleventh Circuit below) categorically foreclosed large categories of previously eligible individuals from seeking Section 212(c) relief, even though relief *is* available *nunc pro tunc* to otherwise similarly situated persons who have left the country and reentered before

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[14] The Fourth and D.C. Circuits have yet to address the question presented, but those courts hear only a tiny fraction of the total number of petitions for review from the BIA. Between September 30, 2005 and September 29, 2008, the Fourth Circuit heard less than 2.7% of all BIA appeals, and the D.C. Circuit heard none at all. *See* 2008 Annual Report at Table B-3.

the removal proceeding commenced. The decision below should be reversed.

1. The BIA's *Blake* decision creates an irrational distinction between LPRs who have traveled abroad and LPRs who have not, contrary to Section 212(c) as it has consistently been interpreted and contrary to equal protection.

Congress has long accepted the BIA's application of Section 212(c) to deportable LPRs who traveled abroad after their convictions and before the initiation of proceedings. When Congress enacted Section 212(c) in 1952, the BIA had interpreted its predecessor—the Seventh Proviso to Section 3 of the Immigration Act of 1917—to provide relief to an LPR in deportation proceedings who had previously traveled abroad, just as it would have applied if he had been placed in exclusion proceedings at the border. *L-*, 1 I. & N. Dec. at 5-6; *see also St. Cyr*, 533 U.S. at 294 (noting that the INS "relied on [the Seventh Proviso] to grant relief *in deportation proceedings* involving aliens who had departed and returned to this country after the ground for deportation arose" (emphasis added)).

Congress is presumed to have been aware of the BIA's interpretation of the discretionary waiver as applicable to deportable LPRs. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). As the BIA explained shortly after Section 212(c)'s enactment, Congress conducted a "comprehensive study" of the Seventh Proviso before enacting Section 212, "[y]et there is nothing to indicate that Congress wished to cut off this unique relief in deportation proceedings." *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1955). Congress thus "effectively ratified" the BIA's practice of granting discretionary relief from deportation as well as from exclusion. *FDA* v.

Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000); *see also Boeing Co.* v. *United States*, 537 U.S. 437, 456-457 (2003) (Congress's failure to override a seven-year-old regulation when amending relevant statutory provisions "serves as persuasive evidence that Congress regarded that regulation as a correct implementation of its intent").[15]

Following the Second Circuit's 1976 decision in *Francis*, the BIA and all of the courts of appeals agreed that deportable LPRs who had *not* traveled abroad were constitutionally entitled to the same treatment under Section 212(c) as LPRs who had. *Francis*, 532 F.2d at 273 (ruling that LPRs who had not traveled abroad were "in like circumstances, but for irrelevant and fortuitous factors," to LPRs who had and therefore should be "treated in a like manner"); *see supra* n.3. The BIA implemented *Francis* using the "statutory counterpart" test, which meant that Section 212(c) relief was available to LPRs who were deportable for a conviction that fell under a "counterpart" *exclusion* provision.

Section 212(c) relief was widely available to LPRs charged with being deportable on the basis of aggravated felony convictions, including convictions for crimes involving "sexual abuse of a minor," because most such convictions are also grounds for exclusion—

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[15] The Ninth Circuit, which recently held Section 212(c) inapplicable to deportable LPRs (*Abebe*, 554 F.3d at 1207), ignored congressional acquiescence in the BIA's interpretation of Section 212(c) as applicable to deportable LPRs. Indeed, under the Ninth Circuit's rationale, Mr. St. Cyr would have been ineligible for Section 212(c) relief because he was charged as deportable. 533 U.S. at 293.

"crimes involving moral turpitude" under INA § 212(a)(2)(A)(i). The BIA and numerous court of appeals decisions recognized the proper application of Section 212(c) relief in such aggravated felony cases. *See supra* pp. 11-13, nn.6-7. Although Congress amended the INA after *Francis*, it has not cast doubt on that consistent interpretation of Section 212(c). *See supra* n.8.

After the 1996 repeal of Section 212(c), the BIA attempted to apply the repeal retroactively to LPRs who had pled guilty before the repeal was enacted. *E.g.*, *St. Cyr* v. *INS*, 229 F.3d 406, 409 (2d Cir. 2000) (observing that the BIA denied St. Cyr's application for Section 212(c) relief "specifically" because IIRIRA repealed that provision), *aff'd*, 533 U.S. 289 (2001). After this Court reversed that practice in *St. Cyr*, the BIA tried another tack, claiming for the first time that eligibility "turns on whether Congress has employed *similar language* to describe substantially equivalent categories of offenses." *Blake*, 23 I. & N. Dec. at 728 (emphasis added). While acknowledging that "there may be considerable overlap" between deportation provisions like "sexual abuse of a minor" offenses and inadmissibility provisions like "crime[] involving moral turpitude," the BIA claimed that the "two categories of offenses [were] not statutory counterparts." *Id.*

The BIA has admitted that this was "a change in law." *Cardona*, 2005 WL 3709244. It was also contrary to the settled interpretation of Section 212(c) acknowledged in the BIA's own decisions. The BIA never attempted to explain why differences in the wording of deportation and inadmissibility provisions—most of which were independently amended at different times—should control whether an LPR is eligible for Section 212(c) relief. *See Blake* v. *Carbone*, 489 F.3d at

102 ("Congress did not employ similar terms when writing the grounds of exclusion and grounds of deportation because it had no need to, making it an exercise in futility to search for similar language to gauge whether equal protection is being afforded."). Indeed, the BIA held decades ago that a waiver of *exclusion* based on a particular criminal conviction also waived any basis for *deportation* based on "the same criminal conviction," without regard to the language of the statutory subsections. *G-A-*, 7 I. & N. Dec. at 275; *see Abebe*, 493 F.3d at 1109 (Berzon, J., concurring).

The BIA's new approach, like that of the Eleventh Circuit below, draws an arbitrary and irrational line based on recent travel abroad. LPRs who pled guilty to a pre-1997 offense that qualifies as both a "sexual abuse of a minor" aggravated felony and a "crime involving moral turpitude" may still seek Section 212(c) relief if they depart the country and return, by invoking the *nunc pro tunc* procedure. But under *Blake*, identically-situated LPRs who did *not* depart the country are categorically ineligible for relief. Making Section 212(c) relief turn on whether a person has or has not left the country, in the face of consistent and contrary judicial and agency decisions before 2005, is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). That is particularly the case given that Section 212(c) is designed to *favor* those LPRs who have strong ties to the United States. *See Francis*, 532 F.2d at 273; *see also Rosario* v. *INS*, 962 F.2d 220, 225 (2d Cir. 1992) (noting the government's position that Section 212(c)'s purpose is to provide relief to "aliens who have developed such strong ties to this country that exclusion or deportation

would be unjustly harsh" (internal quotation marks omitted)).[16]

The BIA's new approach is also inconsistent with the guarantee of equal protection in the Due Process Clause of the Fifth Amendment, which protects LPRs as well as citizens. *Mathews* v. *Diaz*, 426 U.S. 67, 77-78 (1976); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896). The BIA may not make discretionary waivers of deportation available only to a subcategory of similarly situated deportable LPRs on the basis of an irrational classification, such as recent travel abroad. *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation ... will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886) ("Though the law itself be fair on its face ... if it is applied and administered by public authority ... so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights,

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[16] *Blake* is also arbitrary and capricious in that it gives the government an exclusive right to determine whether Section 212(c) relief will be available in many cases. Because a criminal conviction can often render an individual deportable under more than one provision—*e.g.*, assault may be both a "crime involving moral turpitude" (waivable under *Blake*) and a "crime of violence" (not waivable under *Blake* and *Brieva-Perez*)—the BIA's new rule places Section 212(c) eligibility entirely under the government's control. In applying *Blake*, courts of appeals have conceded that certain LPRs would be eligible for a Section 212(c) waiver if the government had chosen to assert a criminal conviction as a crime involving moral turpitude rather than an aggravated felony. *See Dalombo Fontes* v. *Gonzales*, 483 F.3d 115, 122 (1st Cir. 2007); *see also Kim*, 468 F.3d at 62-63.

the denial of equal justice is still within the prohibition of the constitution.").

Mr. De la Rosa's conviction is indisputably for a crime involving moral turpitude (*see Ramsey* v. *INS*, 55 F.3d 580, 582 (11th Cir. 1995)), which is a ground of inadmissibility that would have allowed him to seek Section 212(c) relief *nunc pro tunc* had he left the country. Neither the government nor the decision below suggested otherwise. Yet the Eleventh Circuit offered no rational reason for affording *worse* treatment to an LPR like Mr. De la Rosa who *never* left the country after his arrival than to LPRs who did. *See Mathews*, 426 U.S. at 83 (noting that it is "of greatest importance" in the equal protection analysis that "those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not").

The Second Circuit's approach, by contrast, is faithful to the BIA's longstanding and accepted interpretation of Section 212(c), and it avoids the irrational distinction inherent in the Eleventh Circuit's decision. As the Second Circuit held, an LPR should be eligible to apply for Section 212(c) relief "if his or her particular aggravated felony offense could form the basis of exclusion under § 212(a) as a crime of moral turpitude." *Blake* v. *Carbone*, 489 F.3d at 104.

That approach, which the BIA and the courts followed for nearly thirty years under *Francis*, does not create any distinction based on departure from the United States. Rather, it simply continues the long-accepted rule that an LPR who would be entitled to seek relief *nunc pro tunc* from deportation, had he departed, remains eligible if he did not depart. *See, e.g.*, *Matter of Fuentes-Campos*, 21 I. & N. Dec. 905, 913

(BIA 1997) ("In *Francis* ... [the Second Circuit] concluded that the Board violated the constitutional requirement of equal protection when it permitted one alien in deportation proceedings to apply for a waiver but denied permission to another alien in deportation proceedings, based solely on the fact that one had departed and returned prior to the deportation proceedings while the other had not.").[17]

The Second Circuit accordingly directed the BIA to determine whether the LPR's conviction was a "crime involving moral turpitude" that would have been waivable *nunc pro tunc* had he departed the United States and returned, and, if it was, to consider the Section 212(c) application on the merits. 489 F.3d at 105. The BIA's failure to do likewise in Mr. De la Rosa's case was arbitrary and capricious, inconsistent with the settled interpretation of Section 212(c), and unconstitutional.[18]

2. The BIA's *Blake* decision was also an improper retroactive application of an erroneous interpretation of the 2004 DOJ regulation, which sought to implement *St. Cyr*, not to confine it. The regulation provides that Section 212(c) relief "shall be denied if ... [t]he alien is deportable under former section 241 of the Act or re-

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[17] The Ninth Circuit performed the wrong comparison: it compared deportable LPRs with inadmissible LPRs. *Abebe*, 554 F.3d at 1206. The correct comparison is between two groups of *deportable* LPRs: one group that has left the country and reentered, and one that has not. *Blake* v. *Carbone*, 489 F.3d at 95; *Francis*, 532 F.2d at 273.

[18] On remand from the Second Circuit, an IJ found Mr. Blake eligible for a Section 212(c) waiver and granted relief. The government did not appeal.

movable under [S]ection 237 of the Act on a ground which does not have a statutory counterpart in [S]ection 212 of the Act." 8 C.F.R. § 1212.3(f)(5). On its face, this regulation is consistent with the BIA's prior rulings that an LPR deportable for an aggravated felony conviction was eligible for Section 212(c) relief if the *conviction* would also fall under a counterpart inadmissibility provision.

In *Blake*, the BIA purported to interpret the regulation differently, not based on anything in the regulation itself, but on an anonymous commenter's opinion, cited in the preamble to the final regulation, that Section 212(c) relief should be denied " 'if there is no comparable ground of inadmissibility for the specific *category* of aggravated felony charged. ... [F]or example, the rule should not apply to aggravated felons charged with deportability under specific types or categories of aggravated felonies such as "*Murder, Rape, or Sexual Abuse of a Minor*" or "*Crime of Violence*" aggravated felonies.' " 23 I. & N. Dec. at 726 (quoting 69 Fed. Reg. 57,826, 57,831 (Sept. 28, 2004)).

The commenter misinterpreted the statutory counterpart test by focusing on the category of aggravated felony charged rather than the underlying offense. The commenter did not identify a single decision forbidding an LPR with a conviction in any of the identified aggravated felony categories from seeking Section 212(c) relief. As noted above, the statutory counterpart rule affected LPRs with convictions for firearms offenses or entry without inspection. *See supra* p. 10, n.4 & n.5; *Hernandez-Casillas*, 20 I. & N. Dec. at 282 n.4. And contrary to the commenter's assertion, Section 212(c) can be used to waive deportation for crimes such as murder and rape, although such serious offenses require a heightened showing in order to warrant a fa-

vorable exercise of discretion. *See* 6 Gordon, Mailman & Yale-Loehr, *Immigration Law & Procedure* § 74.04[1][a], [2][g] (2007).[19]

But even if the commenter's interpretation were correct and constitutional (and it is neither), the BIA cannot use an adjudicatory proceeding to apply a regulation retroactively, when no statutory or regulatory language envisions retroactive application. *See Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208-209 (1988) ("[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result. ... Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.").

III. This Case Presents An Issue Of Exceptional And Continuing Importance To Numerous Legal Permanent Residents

The LPRs most affected by the BIA's decision in *Blake* include many who have strong claims for a discretionary waiver of removal. As this Court has observed, Section 212(c) relief is granted based on criteria including "the seriousness of the offense, evidence of either rehabilitation or recidivism, the duration of the alien's residence, the impact of deportation on the fam-

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[19] The DOJ, in the "supplementary information" accompanying the final regulation, agreed that " 'an alien who is deportable or removable on a ground that does not have a corresponding ground of exclusion or inadmissibility is ineligible for section 212(c) relief.' " *Blake*, 23 I. & N. Dec. at 726-727 (quoting 69 Fed. Reg. 57,831). It did not, however, take any position on the commenter's enumeration of the various offenses that the commenter believed lacked a statutory counterpart.

ily, the number of citizens in the family, and the character of any service in the Armed Forces." *St. Cyr*, 533 U.S. at 296 n.5 (citing *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978)). Mr. De la Rosa's offense, which took place when he was twenty (he is now 36), did not involve coercion or violence. An IJ found him to be "rehabilitated." App. 39a. He lived in the United States for nearly twenty years, has three U.S. citizen children aged three, seven, and ten who depend on him, and has a U.S. citizen father and several U.S. citizen siblings, nieces, and nephews. The record is replete with supporting statements and financial information attesting to his strong work ethic and good standing in his community. C.A. A.R. 100-169.

Mr. De la Rosa is not alone. Because deportable "aggravated felony" offenses have been defined broadly and "without regard to how long ago they were committed[,] ... the class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted." *St. Cyr*, 533 U.S. at 295-296 (noting that from 1989 to 1995, "§ 212(c) relief was granted to over 10,000 aliens"). Despite its repeal in 1996, Section 212(c) continues to provide critical relief to numerous LPRs who were convicted of a crime long ago, but are otherwise deserving members of their local United States communities. *See id.* at 296 n.6 (noting increased importance of Section 212(c) relief following 1996 expansion of "aggravated felony" definition to include "more minor crimes which may have been committed many years ago").

Petitioner does not contend that he has a legal *right* to relief; Section 212(c) remains and has always been a discretionary provision. But he does have a right to

have the agency exercise that discretion following an evidentiary hearing on the merits—a hearing that he was entitled to as of February 2005 and was only denied because of the BIA's retroactive "change in law." *Cardona*, 2005 WL 3709244; *see also* App. 43a-44a.

Absent this Court's intervention, numerous deserving legal immigrants will be unlawfully denied relief from removal based only on an accident of geography—the jurisdiction in which their immigration proceedings happened to be held. *See* App. 45a-52a (non-exhaustive list of cases affected by BIA's decision in *Blake*). But for Mr. De la Rosa's and his wife's decision to raise their family in Florida rather than New York, this "rehabilitated" individual would most likely still be working productively and supporting his U.S. citizen children and family.[20]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[20] This Court denied certiorari in *Gonzalez-Mesias* v. *Holder*, 129 S. Ct. 2042 (2009), but at that time the Eleventh Circuit had not addressed the issue (*see* App. 1a (noting that the question presented was "an issue of first impression")), and the Ninth Circuit was still considering the petition for full court rehearing in *Abebe*. The views of those circuits are now known and have only deepened the circuit split, and no further percolation among the circuits should be expected. Moreover, the petition in *Gonzalez-Mesias* may not have fully apprised the Court of the frequency with which the issue arises. App. 45a-52a. We submit that this issue is now fully ripe for this Court's review.

Respectfully submitted.

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NOVEMBER 2009

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13861
Agency No. A42-086-274
[579 F.3d 1327]

JOSE ERASMO DE LA ROSA,
Petitioner,

v.

U.S. ATTORNEY GENERAL,
Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

[STAMP: FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUGUST 20, 2009
THOMAS K. KAHN
CLERK]

(August 20, 2009)

Before DUBINA, Chief Judge, and BIRCH and WILSON, Circuit Judges.

PER CURIAM:

This case presents us with an issue of first impression in our circuit. Jose Erasmo De la Rosa ("De la Rosa") petitions for review of the Board of Immigration Appeals' ("BIA") decision affirming the Immigration

Judge's ("IJ") determination that he was statutorily ineligible for a waiver of his deportation charge. He contends that his conviction of the aggravated felony of sexual abuse of a minor qualifies him to apply for a waiver of deportation pursuant to the former Immigration and Nationality Act ("INA") § 212(c), 8 U.S.C. § 1182(c) (repealed 1996) ("§ 212(c) waiver"). We disagree and AFFIRM.

I. BACKGROUND[1]

In June 2004, De la Rosa was issued a Notice to Appear ("NTA"). The NTA alleged that De la Rosa, although having been legally admitted to the United States, was deportable[2] because (1) he was from the

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[1] We conclude that we have jurisdiction to entertain De la Rosa's appeal because, although he is a convicted felon, his claims "are constitutional and legal in nature." *Alexandre v. U.S. Att'y Gen.*, 452 F.3d 1204, 1205 (per curiam) (*citing* 8 U.S.C. § 1252(a)(2)(C), (D)).

[2] The respondent provides a useful tutorial on terminology, which we recite in full:

> Prior to the 1996 amendments to the INA, aliens who were ineligible to be admitted to the United States were referred to as "excludable" while aliens who had gained admission but were no longer eligible to remain in the United States were referred to as "deportable." *See United States v. Lopez-Gonzalez*, 183 F.3d 933, 934-35 n.4 (9th Cir. 1999). The INA also provided for separate types of immigration proceedings, depending on whether an alien was excludable or deportable. *Id.*
>
> Under current nomenclature, aliens previously referred to as "excludable" are now referred to as "inadmissible." *Id.*; INA § 212, 8 U.S.C. § 1182. Moreover, the separate exclusion and deportation proceedings have now been consolidated into "removal proceedings." *Id.*;

Dominican Republic and was not a citizen or a national of the United States; (2) he was admitted to the United States in March 1989 as an immigrant; and (3) in 1995, he was convicted in a Florida court of committing a lewd act upon a child under the age of sixteen in violation of Florida Statute § 800.04(3). The NTA charged that De la Rosa was subject to deportation from the United States pursuant to INA §§ 237(a)(2)(A)(iii)[3] and 237(a)(2)(E)(i) because he had been convicted both of an aggravated felony as defined in INA § 101(a)(43)(A)—a law relating to murder, rape, or sexual abuse of a minor—and a crime of domestic violence, *i.e.*, child abuse. The record indicates that De la Rosa pled *nolo contendere* to his aggravated felony charge.

De la Rosa admitted to the allegations in the NTA and conceded that he was deportable but sought relief in the form of a § 212(c) waiver. The government moved to pretermit his application for a § 212(c) waiver and maintained that De la Rosa's aggravated felony conviction rendered him ineligible for § 212(c) relief in accordance with the BIA's decision in *In re Blake*, 23 I. & N. Dec. 722 (BIA 2005). The IJ agreed, pretermitted

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> INA § 240, 8 U.S.C. § 1229a.... [T]here is no significant difference between the terms "excludable" and "inadmissible." Nor is there any significant differen[ce] between "removal" proceedings and "exclusion" or "deportation" proceedings.

Respondent's Brief at 9 n.7. We use these terms interchangeably throughout our opinion.

[3] Under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."

De la Rosa's application for § 212(c) relief, and ordered him removed from the United States.

De la Rosa appealed to the BIA and claimed, *inter alia*, that his aggravated felony conviction constituted a "crime involving moral turpitude" as contemplated by INA § 212(a)(2), thus allowing him to apply for the § 212(c) waiver. Administrative Record ("AR") at 11-13. The BIA disagreed, dismissed the appeal, and found that *Blake* precluded De la Rosa from obtaining a § 212(c) waiver. The BIA reasoned that "[a]s the aggravated felony ground of removal applicable in this case ... has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act, the aggravated felony charge cannot be waived as a ground of deportability under former section 212(c)." *Id.* at 2.

Although the question presented in this case concerns De la Rosa's eligibility for a § 212(c) waiver, our full consideration of that issue demands a close analysis of both the history of INA § 212(c) and how that provision has been interpreted by our sister circuits. Accordingly, we indulge in a brief survey of the legal landscape in this area.

A. *History of INA § 212(c), 8 U.S.C. § 1182(c)*

INA § 212(c) concerns only persons in exclusion proceedings. The statutory language in INA § 212(a) lists classes of excludable aliens who are ineligible for admission to the United States.[4] INA § 212(a); 8 U.S.C. § 1182(a). INA § 212(c), however, vests the Attorney General with the discretion to waive exclusion for

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[4] One of these excludable classes includes aliens convicted of "a crime involving moral turpitude." INA § 212(a)(2)(A)(i)(I); 8 U.S.C. § 1182(a)(2)(A)(i)(I).

"[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years."[5] 8 U.S.C. § 1182(c) (repealed 1996). Even though INA § 212(c) was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[6] relief remains available to aliens "whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *INS v. St. Cyr*, 533 U.S. 289, 326, 121 S. Ct. 2271, 2293, 150 L. Ed. 2d 347 (2001); *see also Alexandre*, 452 F.3d at 1207 (stating that those who had pled *nolo contendere* prior to April 1997 could seek § 212(c) relief pursuant to 8 C.F.R. § 1003.44). Because De la Rosa pled *nolo contendere* to the crime rendering him deportable in 1995, he was eligible to apply for § 212(c) relief.

As we have noted, on its face § 212(c) applies only to exclusion proceedings. That said, the Department of

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[5] We note that the Attorney General is accorded similar discretion to suspend deportation of a person if that person meets a ten-year residence requirement, possesses good moral character, and would be subject to exceptional and extremely unusual hardship if deported. INA § 244; 8 U.S.C. § 1254(a)(2) (repealed 1996).

[6] Congress cut back on the availability of § 212(c) relief prior to its eventual repeal by the IIRIRA. In the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5052, Congress limited § 212(c) relief to aliens who had served fewer than five years in prison. The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), then made § 212(c) relief unavailable to aliens convicted of aggravated felonies and other specified crimes. *See* AEDPA § 440(d).

Homeland Security (formerly the Immigration and Naturalization Service ("INS")) has, for several decades, permitted aliens subject to deportation to seek § 212(c) relief *nunc pro tunc*.[7] The rationale for the expansion was that if the INS allowed a resident alien to reenter the country even though he was excludable and then later sought to deport him, the alien should not be put in a worse position than if he had been excluded in the first instance. *See Matter of G-A-*, 7 I. & N. Dec. 274, 275-76 (BIA 1956). In a previous recitation of § 212(c)'s tortuous history, we explained how this extension produced inequities in its application. *See Farquharson v. U.S. Att'y Gen.*, 246 F.3d 1317, 1323 (11th Cir. 2001). "While one resident alien who became deportable and then voluntarily left the country became eligible for waiver upon reentry, another alien who was deportable for the same reason but never left the country had no recourse." *Id.*

In *Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976), the Second Circuit addressed this distinction and concluded that it was "not rationally related to any legitimate purpose of the statute." *Id.* Instead of striking the statute, however, the Second Circuit elected to extend § 212(c) relief to deportable aliens regardless of whether they had left the United States after committing the act rendering them deportable. *See id.* at 273. The BIA quickly adopted the reasoning of *Francis* and likewise extended § 212(c) relief to deportable aliens. *See Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976).

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[7] "Having retroactive legal effect through a court's inherent power." *Black's Law Dictionary* 1097 (7th ed. 1999).

The BIA later qualified the extension in *Matter of Wadud*, 19 I. & N. Dec. 182 (BIA 1984). In *Wadud*, the BIA settled upon the comparable grounds test as a means of determining whether a deportee and an excludee were similarly situated. Under the test, eligibility for § 212(c) relief turned on whether the "ground of deportation charged is also a ground of inadmissibility." *Id.* at 184 (citations omitted). The BIA expressly "decline[d] to expand the scope of section 212(c) relief in cases where the ground of deportability charged is not also a ground of inadmissibility." *Id.* at 185.

In 1991, the BIA softened the comparable grounds test somewhat in *Matter of Meza*, 20 I. & N. Dec. 257 (BIA 1991). In *Meza*, the BIA applied the statutory framework to an alien deportable for an aggravated felony conviction. Although no ground of exclusion expressly references "aggravated felonies," the BIA nonetheless concluded that "a waiver under section 212(c) is not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion [in § 212(a)] which recites the words, 'convicted of an aggravated felony.'" *Id.* at 259. Instead, the BIA looked to whether the "specific category of aggravated felony at issue" had a comparable ground of inadmissibility in § 212(a). *Id.* The BIA ultimately determined that an alien deportable for an aggravated felony of "illicit trafficking in any controlled substance," as defined in INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), was eligible for a § 212(c) waiver because the category of aggravated felony had a statutory

counterpart of inadmissibility in INA § 212(a)(23), 8 U.S.C. § 1182(a)(23).[8] *Id.*

The comparable grounds test gathered ascendent strength in *Matter of Montenegro*, 20 I. & N. Dec. 603 (BIA 1992), and *Matter of Esposito*, 21 I. & N. Dec. 1 (BIA 1995), both of which also effectively worked to isolate *Meza*. In *Montenegro*, the respondent was found deportable based on his conviction for assault with a firearm. *See Montenegro*, 20 I. & N. Dec. at 605. The respondent argued eligibility for § 212(c) relief under *Meza* because his assault conviction constituted a crime of moral turpitude—a comparable ground of exclusion for purposes of § 212(c) eligibility. *See id.* The BIA disagreed and distinguished *Meza*, limiting it to "the unique situation created by the language and legislative history of an amendment to section 212(c) by [the Immigration Act of 1990], which indicated that some aggravated felons are eligible for a section 212(c) waiver in deportation proceedings even though there is no single comparable ground of exclusion based on conviction of an aggravated felony." *Id.*

Likewise, in *Esposito*, the BIA again rejected the respondent's argument that his ineligibility for § 212(c) relief due to a lack of a comparable exclusion ground was cured because his offense supported some ground of excludability. *See Esposito*, 21 I. & N. Dec. at 9. As stated by the BIA, "[w]hile the respondent could be deemed inadmissible within the meaning of section 212(a)(10) of the Act based in part on his firearms violation, this does not make him eligible for section 212(c)

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[8] In 1990, INA § 212(a)(23), 8 U.S.C. § 1182(a)(23) was revised and redesignated at INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). *See Meza*, 20 I. & N. Dec. at 260 n.5.

relief. [His] firearms conviction standing alone supports a charge of deportation under section 241(a)(14), [he] has in fact been found deportable based on this charge, and section 212(c) cannot waive a charge of deportability under section 241(a)(14) because there is no counterpart among the grounds of inadmissibility in section 212(a)." *Id.* at 8 (citation and alterations omitted). As in *Montenegro*, the BIA also stressed the limited reach of its decision in *Meza*. *See id.* at 9 ("Meza ... is limited to the question of eligibility for section 212(c) relief in the case of a conviction for a drug-trafficking aggravated felony and is based on the specific amendment to section 212(c) regarding aggravated felonies.").

In the period between *Montenegro* and *Esposito*, the Second Circuit decided *Bedoya-Valencia v. INS*, 6 F.3d 891 (2d Cir. 1993). In *Bedoya-Valencia*, the court concluded that because entry without inspection—the charged grounds of deportation at issue—logically cannot have an analogue in the exclusion grounds, "coherence and consistency" dictated providing § 212(c) relief to aliens whose deportable offense was entry without inspection. *Id.* at 897. In extending the *Francis* rule, the court unambiguously articulated its view of the judicial function in this area:

> Absent any Congressional indication to the contrary, we believe that coherence and consistency are promoted by allowing the exercise of § 1182(c) [§ 212(c)] discretion with respect to the deportation ground of entry without inspection. *Francis* effected a significant alteration of the legal framework in this area, and in the absence of any Congressional revisitation of that framework in the aftermath of *Francis*, courts must cope with the interstitial issue posed by grounds of deportation that have no

> counterparts among the statutory grounds for exclusion.
>
> ....
>
> We recognize, of course, as we did in *Francis*, the paramount authority of the executive and legislative branches of our national government with respect to immigration matters, and the correspondingly limited role of the judiciary. We also recognize, however, that federal courts can play an important role in interstitial implementation of a legislative design, especially when that design has already been altered by a constitutionally based court decision.

Id. at 897-88 (citations omitted).

Bedoya-Valencia is particularly important because we expressly rejected its reasoning four months later in *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1460 (11th Cir. 1994). In *Rodriguez-Padron*, the petitioners were subject to deportation based on their convictions for firearms violations for which there was no analogous ground for exclusion. *See id.* at 1458. The petitioners argued that they should be allowed to seek the § 212(c) waiver and relied, in part, on *Bedoya-Valencia*. *See id.* at 1458-59. In rejecting this reliance on the Second Circuit's rationale, we observed that in *Bedoya-Valencia*, "[t]he Second Circuit (unlike the Attorney General in *Hernandez-Casillas*[9] and at least two other circuits)

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[9] *See Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 280-93 (BIA 1990), *aff'd mem.*, 983 F.2d 231 (5th Cir. 1993). In *Hernandez-Casillas*, the Attorney General reversed a BIA decision making § 212(c) relief available to aliens deportable on the ground of entry without inspection, concluding, *inter alia*, that "there

was untroubled by the lack of a basis for this extension [of the *Francis* rule] in the statutory text." Id. at 1460. We added that "[i]n this context, we believe that a statute should be stretched only as far as necessary to prevent unconstitutionality." *Id.* We also noted that Congress could have specified firearms violations as grounds for exclusion but had elected not to do so. Finally, and perhaps most significantly, we accorded *Chevron* deference to the Attorney General's holding in *Hernandez-Casillas*—namely, that the "Section 212(c) waiver is available in the deportation context only to the extent that the grounds of deportation are analogous to one of the grounds for exclusion." *Id.* at 1460-61; *see also Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2781-82, 81 L. Ed. 2d 694 (1984).

We confirmed our determination to guard against further judicial extension of § 212(c) relief in *Farquharson*. *See* 246 F.3d at 1325. In that case, we upheld the comparable grounds approach in response to an equal protection challenge by a petitioner who was found deportable for entry without inspection. *See id.* at 1318. We concluded, in part, that "§ 212(c) has already been stretched beyond its language in response to equal protection concerns, and further judicial redrafting would serve only to pull the statute further from its moorings in the legislative will." *Id.* at 1325 (quotation marks and citation omitted).

In 2004, 8 C.F.R. § 1212.3(f)(5) codified the case law in the area and provided that an application for relief under § 212(c) must be denied if "[t]he alien is deport-

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[was] no constitutional justification for [such] a further departure from the statutory text." *Id.* at 293.

able under section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act." *Id.* And so the statutory counterpart test was born. The BIA's application of this framework in early 2005 proved to be a watershed moment in § 212(c) jurisprudence and is of particular significance in our consideration of the case before us. *See In re Blake*, 23 I. & N. Dec. 722 (BIA 2005).

In *In re Blake*, the BIA applied the statutory counterpart framework and concluded that an alien deportable based on an aggravated felony conviction for sexual abuse of a minor was ineligible for a § 212(c) waiver. *See id.* at 726-29. The BIA found that the respondent was ineligible for § 212(c) relief because "the aggravated felony offense of sexual abuse of a minor has no statutory counterpart in the section 212(a) grounds of inadmissibility." *Id.* at 723. The BIA expressly rejected the respondent's contention that § 212(a)(2)(A)(i)(I), the provision rendering aliens inadmissible who have been convicted of a crime of moral turpitude, was comparable to his aggravated felony charge. *See id.* at 727. The BIA distinguished its decision in *Meza*, which the respondent cited in support of his argument, explaining that "[t]he instant case differs from *Matter of Meza* in that the moral turpitude ground of exclusion addresses a distinctly different and much broader category of offenses than the aggravated felony sexual abuse of a minor charge." *Id.* at 728. The BIA further articulated its statutory counterpart approach as follows:

> [W]hether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility turns on whether Congress has employed similar lan-

> guage to describe substantially equivalent categories of offenses. Although many firearms offenses may also be crimes of moral turpitude, the category of firearms offenses is not a statutory counterpart to crimes of moral turpitude. Similarly, although there may be considerable overlap between offenses categorized as sexual abuse of a minor and those considered crimes of moral turpitude, these two categories of offenses are not statutory counterparts.
>
> ....
>
> The coverage of the offenses described need not be a perfect match in order to be statutory counterparts under the regulation so long as the ground of inadmissibility addresses essentially the same category of offenses under which the removal charge is based. In *Matter of Meza*, ... for example, the language used in describing the drug-related aggravated felony provision covered substantially the same category of drug-related offenses addressed in the exclusion ground. Under the regulation and our precedent decisions, however, the test for comparability is not met merely by showing that some or many of the offenses included in the charged category could also be crimes involving moral turpitude.

Id. at 728-29 (quotation marks omitted).

B. *Section 212(c) in the Wake of In re Blake*

The BIA's decision in *In re Blake* was not uniformly recognized as the last word on the issue. Although it largely crystallized the grounds-based or categorical approach of the statutory counterpart test

("categorical approach"), the Second Circuit rejected its reasoning on appeal in *Blake v. Carbone*, 489 F.3d 88, 101-04 (2d Cir. 2007), and fashioned an offense-based approach as a counterpoint to the BIA's approach. A recent opinion by the Ninth Circuit has introduced yet another formula for handling § 212(c) waivers. *See Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (*en banc*). Having already considered the categorical approach in some detail, we now examine the alternative views advanced by the Second and Ninth Circuits respectively.

1. *Blake v. Carbone—An Offense-Based Approach*

In *Blake*, the Second Circuit declined to accord deference to the BIA's interpretation of the statutory counterpart rule, rejected the categorical approach as violative of *Francis*, and set out its own offense-based approach for determining a deportee's eligibility for § 212(c) relief. After reciting *Chevron*'s familiar mandate, the court concluded that because the statutory counterpart rule "is a creature of constitutional avoidance, arising from the ramifications of a prior constitutional decision of this court, rather than the original statute concerning whose interpretation the Attorney General has conceded expertise," deferring to the BIA's "determination of equal protection" would constitute, in part, an abdication of its "responsibilit[y] to uphold the Constitution." *Blake*, 489 F.3d at 100 (quotation marks and citation omitted).

In rejecting the categorical approach, the Second Circuit observed that the BIA's emphasis on the need for substantially similar language in grounds of deportation and grounds of exclusion was "strange" because Congress "never contemplated that its grounds of deportation would have any connection with the grounds

of exclusion." *Id.* at 102. As asserted by the court, because

> the history of § 212(c) relief for deportees began not with an expression of congressional intent but rather with *Francis*[,] ... Congress did not employ similar terms when writing the grounds of exclusion and grounds of deportation because it had no need to, making it an exercise in futility to search for similar language to gauge whether equal protection is being afforded.

Id. (citation omitted).

The court also took issue with the BIA's "incidental overlap" language[10] and concluded that the BIA's requirement that "all or substantially all of the offenses under a particular ground of deportation must also fall under the counterpart ground of exclusion" was not supported by *Francis*:

> The touchstone in *Francis* was the "irrelevant and fortuitous" circumstance of traveling abroad recently; the decision did not consider

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[10] The BIA further clarified its categorical approach in *In re Brieva-Perez*, 23 I. & N. Dec. 766, 773 (BIA 2005), *aff'd sub. nom. Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007). In *Brieva*, the respondent was found deportable based on his conviction for unauthorized use of a motor vehicle, an aggravated felony crime of violence. *See id.* at 772. In applying the categorical approach, the BIA determined that "[a]lthough there need not be perfect symmetry in order to find that a ground of removal has a statutory counterpart in section 212(a), there must be a closer match than that exhibited by the incidental overlap between section 101(a)(43)(F) (crime of violence) and section 212(a)(2)(A)(i)(I) (crime of moral turpitude)." *Id.* at 773.

> whether equal protection requires that all or even most offenses falling under a particular ground of deportation must also fall under the counterpart ground of exclusion. In short, eligibility for relief in *Francis* turned on whether the lawful permanent resident's offense could trigger § 212(c) were he in exclusion proceedings, not how his offense was categorized as a ground of deportation.

Id. (citation omitted).

The Second Circuit concluded its opinion in *Blake* by staking out the contours of its offense-based approach to the statutory counterpart test: "[P]etitioners' eligibility for a § 212(c) waiver must turn on their particular criminal offenses. If the offense that renders a lawful permanent resident deportable would render a similarly situated lawful permanent resident excludable, the deportable lawful permanent resident is eligible for a waiver of deportation." *Id.* at 103.

2. *Ninth Circuit's Repudiation of the Francis Rule*

The Ninth Circuit has taken a different tact altogether. In *Abebe*, the court overruled its precedent that both had adopted *Francis* and endorsed the statutory counterpart test. *See Abebe*, 554 F.3d at 1207; *see also Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981). In so doing, the court reassessed the "complex legislative scheme" concerning § 212(c) waivers and afforded fresh consideration to "whether [it could] conceive of a rational reason Congress may have had in adopting it." *Abebe*, 554 F.3d at 1206. The *Abebe* court found that it could and explained as follows:

> Congress could have limited section 212(c) relief to aliens seeking to enter the country from

> abroad in order to create an incentive for deportable aliens to leave the country. A deportable alien who wishes to obtain section 212(c) relief will know that he can't obtain such relief so long as he remains in the United States; if he departs the United States, however, he could become eligible for such relief. By encouraging such self-deportation, the government could save resources it would otherwise devote to arresting and deporting these aliens. Saving scarce resources that would otherwise be paid for by taxpayers is certainly a legitimate congressional objective.

Id. (quotation marks, citations and alterations omitted). By repudiating *Francis* and eliminating the statutory counterpart rule altogether, the Ninth Circuit has forged its own path and neatly avoids any consideration of the relative merits of the Second Circuit's offense-based approach versus the categorical approach followed by the majority of the other circuits who have entertained the issue.

As it stands, there exists a three-way circuit split on the question of whether certain deportees who have not temporarily left the country are eligible for § 212(c) relief. The BIA and the majority of our sister circuits have adopted the *Francis* rule and have applied the categorical approach when dealing with the resulting statutory counterpart test.[11] Under the categorical ap-

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[11] *See, e.g., Gonzalez-Mesias v. Mukasey*, 529 F.3d 62, 64-65 (1st Cir. 2008); *Caroleo v. Gonzales*, 476 F.3d 158, 162-63 (3d Cir. 2007); *Vo v. Gonzales*, 482 F.3d 363, 372 (5th Cir. 2007); *Koussan v. Holder*, 556 F.3d 403, 412-13 (6th Cir. 2009); *Valere v. Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007); *Soriano v. Gonzales*, 489 F.3d 909 (8th Cir. 2006) (per curiam).

proach, the central inquiry is whether a petitioner's ground of deportation has a comparable ground of exclusion under § 212(a). This approach focuses on the categorical similarity of the corresponding grounds and avoids any examination of a petitioner's underlying offense and whether it could render him excludable under § 212(a).

The Second Circuit also has adopted the *Francis* rule but employs an offense-based approach when considering the resultant statutory counterpart test. Under this approach, the inquiry focuses on a petitioner's underlying offense. If the underlying offense responsible for a petitioner's deportation could render him excludable under § 212(a), then he is eligible for § 212(c) relief.

Finally, the Ninth Circuit has abandoned the *Francis* rule and its accompanying statutory counterpart test altogether. In the wake of *Abebe*, deportable aliens in the Ninth Circuit who have not left the country are not eligible for § 212(c) relief. With this menu of options in mind, we now consider the merits of De la Rosa's petition for review.

II. DISCUSSION

We review the BIA's legal determinations *de novo*. *See Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1195 (11th Cir. 2006). However, our review of the BIA's interpretation of the statutes it administers "is informed by the principle of deference articulated in *Chevron*."[12] *Id.* (quotation marks and citation omitted).

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[12] We have held that *Chevron* deference is not appropriate in cases in which a single member of the BIA issues a non-

De la Rosa advances several arguments in support of his central contention that the BIA erred in finding him ineligible for § 212(c) relief. First, he argues that the BIA's decision in *In re Blake* contradicts BIA and federal circuit precedent on the issue. De la Rosa claims that such precedent provides that § 212(c) relief is available to waive non-drug aggravated felony convictions that are also crimes involving moral turpitude. Our view of the applicable BIA precedent is at odds with De la Rosa's interpretation. As early as 1984, the BIA rejected the argument that a respondent could obtain a § 212(c) waiver if his underlying offense constituted a crime of moral turpitude even if his charged ground of deportability lacked a statutory counterpart in the grounds of inadmissibility. *See Wadud*, 19 I. & N. Dec. at 185-86. When addressing the statutory counterpart test, the BIA consistently has followed a categorical approach that focuses on the charged ground of deportability rather than the underlying offense. *See Esposito*, 21 I. & N. Dec. at 9; *Montenegro*, 20 I. & N. Dec. at 605; *Meza*, 20 I. & N. Dec. at 259; *Wadud*, 19 I. & N. Dec. at 185-86. Consequently, *In re Blake*'s focus on the charged grounds of deportation instead of the underlying offense did not represent a departure from prior BIA practice. *See In re Blake*, 23 I. & N. Dec. at 729. De la Rosa's reliance on unpublished BIA decisions is misplaced as the BIA accords no precedential value to its unreported decisions. *See Matter of Zangwill*, 18 I. & N. Dec. 22, 27 (BIA 1981),

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precedential decision that does not rely on existing BIA or federal court precedent. *See Quinchia v. U.S. Att'y Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008). Whereas the case before us was decided by a single member of the BIA, it is distinguishable from *Quinchia* because it relied on the BIA's precedent in *Blake*. *See id.*

overruled on other grounds, Matter of Ozkok, 19 I. & N. Dec. 546 (BIA 1988).

De la Rosa also asserts that *In re Blake* is inconsistent with the Attorney General's decision in *Hernandez-Casillas*. *See Hernandez-Casillas*, 20 I. & N. Dec. at 280-93. Seizing on the Attorney General's comments in a footnote[13], De la Rosa disregards the body of the opinion which unambiguously supports the categorical approach and expressly states that equal protection does not require that discretionary relief be made available "where the ground for deportation could not be waived if asserted in an exclusion case." *Id.* at 288.

De la Rosa again attempts to glean support for his position with a curious construction of § 212(c)'s plain language. He contends that § 212(c) provides that an alien convicted of an aggravated felony with a term of imprisonment of less than five years could qualify for § 212(c) relief as long as his conviction caused inadmissibility. So far, so good. But De la Rosa then asserts that this language somehow implies that *any* aggravated felon with a term of imprisonment of less than five years qualifies for § 212(c) relief. We disagree and point out that the language at issue merely excludes a class of aggravated felons from eligibility for § 212(c) relief. *See* INA § 212(c); 8 U.S.C. § 1182(c) (providing that "[t]he first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years"). In any event, De la Rosa appears to agree that a de-

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[13] *See id.* at 282 n.4 (pointing out that two grounds of deportation—illegal entry and conviction of illegal possession of certain firearms—have no analogue in the grounds for exclusion).

portee's eligibility for § 212(c) relief is predicated on whether, as he styles it, "the [deportee's] conviction caused inadmissibility." Petitioner's Brief at 4. In our view, this admission marks De la Rosa's argument as superfluous and returns us to where we started.

As previously noted, De la Rosa maintains that federal courts also have extended § 212(c) relief to deportees convicted of aggravated felonies unrelated to drugs. He cites three cases from our circuit in support of this argument—*Adefemi v. Ashcroft*, 358 F.3d 828 (11th Cir. 2004); *Cunningham v. U.S. Att'y Gen.*, 335 F.3d 1262 (11th Cir. 2003) (per curiam); and *Ramsey v. INS*, 55 F.3d 580 (11th Cir. 1995) (per curiam). We conclude that these cases are inapposite. We vacated the *Adefemi* opinion cited by De la Rosa, reheard the case *en banc*, and ultimately determined that the petitioner was not eligible for § 212(c) relief. *See Adefemi v. Ashcroft*, 386 F.3d 1022, 1031 (11th Cir. 2004) (*en banc*). In *Cunningham*, the petitioner was denied the opportunity to apply for § 212(c) relief because the IJ applied the wrong law. *See Cunningham*, 335 F.3d at 1264, 1268. We determined that the petitioner was entitled to apply for relief and remanded the case so that the IJ could apply the appropriate law. *See id.* at 1268. Finally, in *Ramsey*, we denied the petitioner's application for § 212(c) relief on the merits. *See Ramsey*, 55 F.3d at 582-83. De la Rosa transforms our lack of analysis regarding Ramsey's statutory eligibility for § 212(c) relief into a holding that deportees convicted of aggravated felonies that are crimes of moral turpitude are statutorily eligible for § 212(c) relief. We reject De la Rosa's expansive reading of our holding and conclude that *Ramsey* lends no support to De la Rosa's argument.

Although we have dispensed with the bulk of De la Rosa's explicit challenges, we now circle back and ad-

dress the implicit argument underpinning his position. De la Rosa's petition for review expressly recites neither equal protection nor the Second Circuit's decision in *Blake* as a basis for appeal. That said, his argument can be fairly read as a challenge to the BIA's categorical approach to the statutory counterpart test. He argues that he is eligible for § 212(c) relief because his conviction of the aggravated felony of sexual abuse could qualify as a crime of moral turpitude, a comparable ground of inadmissibility under § 212(a). In urging us to look to the conduct or offense underlying his conviction, De la Rosa effectively is asking us to adopt the Second Circuit's offense-based approach to the statutory counterpart test. Because *Blake*'s holding rests on a more expansive view of equal protection than we find palatable, we must decline. Instead, we join the majority of our sister circuits who have considered the issue and adopt the categorical approach to the statutory counterpart test.[14]

Our decision is supported by the both our precedent and the considered reasoning advanced by our sister circuits. We recognize that clarity in this area has proven an elusive goal, given the complexity created by overlapping administrative decisions, judicial opinions and Congressional actions. We acknowledge that our own reasoning on this issue has evolved over time, in fits and starts, and has not lent itself to a bright-line

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[14] Our long-standing endorsement of *Francis* precludes us from considering the route taken by the Ninth Circuit in *Abebe*. *See, e.g., Chuang v. U.S. Att'y Gen.*, 382 F.3d 1299, 1304 (11th Cir. 2004) (per curiam); *Farquharson*, 246 F.3d at 1324-25; *Yeung v. INS*, 76 F.3d 337, 341 (11th Cir. 1995); *see also Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001) (discussing our prior panel precedent rule).

rule. That, in part, is why we have labored to trace the history of the law in this area, with all its attendant twists and turns. Our study is directed at discerning the trajectory of the law. In so doing, we must guard against the temptation to cherry-pick those portions along the continuum that we might find appealing or convenient and remind ourselves that we are bound by the canons of deference and judicial restraint to respect the law's contemporary terminus.

In our view, we parted ways with the Second Circuit in *Rodriguez-Padron*. *See* 13 F.3d at 1460. In that case, we rejected any additional extension of the *Francis* rule—itself a judicially created extension on equal protection grounds. We reiterated our aversion to "stretch[ing] [§ 212(c)] beyond its language" again in *Farquharson*, and observed that "further judicial redrafting would serve only to pull the statute further from its moorings in the legislative will." 246 F.3d at 1325 (quotation marks and citation omitted). Although we consistently signaled our view that any additional extension of § 212(c) beyond *Francis* is "not constitutionally required," we stress that we have in no way abandoned our adoption of the equal protection rationale of *Francis* itself. *Id.* Indeed, we have affirmed our commitment to the *Francis* rule on several occasions. *See, e.g.*, *Chuang*, 382 F.3d at 1304; *Farquharson*, 246 F.3d at 1324-25; *Yeung*, 76 F.3d at 340.

We read *Francis* as extending equal protection to two classes of similarly situated deportable aliens—one class in which an alien is convicted of a deportable offense and is placed in deportation proceedings and another class in which an alien is convicted of a deportable offense, travels abroad, returns to the United States, and then is placed in deportation proceedings. The Second Circuit's offense-based approach to the statutory

counterpart test, however, departs from *Francis* in several respects. Many of our sister circuits have considered this issue quite closely and we find much to admire in their logic.

The Seventh Circuit's observation that "not every act that renders someone deportable makes him excludable, and vice versa" largely captures the thrust of the first counter-argument to *Blake*'s rationale. *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 683 (7th Cir. 2008). Simply put, a deportable alien usually is not similarly situated to an excludable alien. This is because Congress delineated different grounds for deportation and exclusion. If, however, an alien's ground for deportation has a statutory counterpart in a ground of exclusion, then the two classes (deportable and excludable aliens) are similarly situated and any distinction between them would be arbitrary and violate equal protection. This point is succinctly captured by the Ninth Circuit in the following passage[15]:

> Generally, when courts have found an equal protection violation, the excludability and deportation provisions have been substantially identical. That way, the only distinction between the two classes of persons the statute created was that one class of individuals had traveled abroad and returned, and the other had not. It is this arbitrary distinction that violates equal protection. In the instant case, the

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[15] We recognize that the Ninth Circuit has departed from its holding in *Komarenko*. *See Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009). *Komarenko*'s reasoning, however, remains persuasive for those circuits who continue to follow the BIA's rationale in *In re Blake*.

> provisions are entirely dissimilar, and the distinction between the two classes is not arbitrary or unreasonable. For this reason, the linchpin of the equal protection analysis in this context is that the two provisions be substantially identical.

Komarenko v. INS, 35 F.3d 432, 435 (9th Cir. 1994) (quotation marks and citation omitted), *abrogated by Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009).

Having established the statutory counterpart test as the "linchpin" of the equal protection analysis in the area, we next consider the merits of the categorical approach. We find the Third Circuit's reasoning particularly instructive. In *Caroleo*, 476 F.3d at 160-61, an alien was found deportable for his conviction, among other things, of an aggravated-felony crime of violence—attempted murder. The alien sought a § 212(c) waiver and argued that attempted murder is a crime involving moral turpitude, which is a ground of inadmissibility under § 212(a). *See id.* at 164. The court rejected the argument and drew a distinction between § 237 of the INA, which lists the grounds upon which the Attorney General may order an alien deported, and the statutory counterpart test under § 212(c). *See id.* "It is in this context [§ 237] that courts look to an alien's *underlying criminal conviction* to determine whether if falls within one of § 237's statutory grounds for removal." *Id.* The court explained the secondary analysis under § 212(c) as follows:

> The statutory counterpart requirement under § 212(c), on the other hand, presents an entirely different question. In an application for § 212(c) *relief—i.e. a discretionary waiver of removal*, the alien's removability has already

> been established—i.e., it has already been determined that the underlying crime for which he has been convicted falls within one of INA § 237's grounds for removal. The relevant statutory counterpart inquiry then looks—not to the underlying criminal conviction—but rather to the *statutory ground for removal contained in INA § 237* and whether it has a counterpoint in the *statutory ground for exclusion provisions of INA § 212(a)*. Under this categorical analysis, we compare the removal and exclusion provisions *of the INA* to determine whether they are substantially equivalent.

Id. (quotation marks omitted). The court concluded that "the underlying crime for which [the petitioner] was convicted plays no role in this inquiry. It is therefore irrelevant that [his] conviction ... *could* have subjected him to removal as an alien convicted of a crime of moral turpitude under INA § 237(a)(2)(A)(i)." *Id.* at 168 (emphasis added). Comparing the underlying criminal offense—instead of the statutory ground of deportation—with the ground of inadmissibility hazards the congruity between an alien in deportation proceedings and an alien in exclusion proceedings. This is so because the underlying offense *could* be among a wide array of inadmissible offenses, or not. With no congruity established, the aliens in question are not similarly situated, and equal protection is not implicated.

We also are swayed by the Seventh Circuit's observation that "if courts were to look beyond the charged grounds of deportation to the underlying criminal offense to determine whether the criminal offense *could* have been treated as a crime of moral turpitude, that would greatly expand the role Congress

assigned the judiciary in immigration cases." *Zamora-Mallari*, 514 F.3d at 692 (referencing *Komarenko*). This point is underscored in the following passage from *Abebe*:

> Congress has vested the executive branch with discretion in whether, when, and how to charge an alien with removal. How it exercises that discretion will have a serious impact on the life of a removable alien, whether it means forcible removal from the country or the availability of section 212(c) relief. To hold that the exercise of that discretion is unconstitutional where it is not exercised in the most advantageous way possible for a given alien under the circumstances would open the door to a torrent of claims. An alien is no more entitled to section 212(c) relief when charged with a ground of removal that has no statutory counterpart under the INA's inadmissibility provisions than a defendant is entitled to a sentencing range consistent with the least serious crime with which he could have been charged.

Abebe, 554 F.3d at 1212 (Clifton, J., concurring).

Finally, we reiterate our aversion to the judicial extension of a statute absent sufficient constitutional justification. Extending it once does not empower a court to extend it *ad infinitum*, without any foundation in the statute or case law. When a rule, born of a series of *ad hoc* judicial extensions to a statute, no longer bears any passing resemblance to its parent legislation, that rule is a creature of judicial legislation. We decline to breathe further life into such a construct and hew to the maxim that courts are charged with adjudication, not legislation.

De la Rosa was found deportable based upon his conviction of the aggravated felony of sexual abuse of a minor. Employing the categorical approach to the statutory counterpart test, we look to whether the grounds for his deportation have a statutory counterpart to a crime involving moral turpitude under INA § 212(a). The BIA has determined that sexual abuse of a minor does not have a statutory counterpart in the crime of moral turpitude provision in § 212(a). *See In re Blake*, 23 I. & N. Dec. at 729. Affording due deference to the BIA's interpretation of the INA, we conclude that De la Rosa's implicit equal protection argument fails.

III. CONCLUSION

De la Rosa petitions for review of the BIA's decision affirming the IJ's determination that he was statutorily ineligible for a waiver of his deportation charge. Applying the categorical approach to the statutory counterpart test, we conclude that De la Rosa's conviction of the aggravated felony of sexual abuse of a minor does not have a statutory counterpart in the grounds of inadmissibility in § 212(a). Accordingly, he is ineligible for § 212(c) relief.

AFFIRMED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A42 086 274—Orlando, FLDate: [STAMP: JUN 10 2008]

In re: JOSE ERASMO DE LA ROSA a.k.a. Jose Delarosa

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Wilfred Calero, Esquire

ON BEHALF OF DHS: Yon Alberdi
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]—Convicted of aggravated felony

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)]—Convicted of crime of domestic violence, stalking, or child abuse, neglect, or abandonment

APPLICATION: Section 212(c) waiver of inadmissability

ORDER:

PER CURIAM. The respondent, a native and citizen of the Dominican Republic, conceded that he is re-

movable from the United States under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony within the meaning of section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A), specifically, for sexual abuse of a minor. The factual basis for this charge was the respondent's 1995 Florida conviction for the offense of lewd act upon a child (child under 16 years old) in violation of section 800.04(3) of the FLORIDA STATUTES ANNOTATED. The respondent appeals from an Immigration Judge's March 16, 2007 decision. In that decision the Immigration Judge concluded, *inter alia*, that the respondent was statutorily ineligible for a waiver of inadmissibility under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (repealed 1996). The appeal is dismissed.

This Board, in 2005, issued a precedent decision holding that aliens removable on the basis of convictions for sexual abuse of a minor are not eligible for section 212(c) relief because the sexual abuse of a minor aggravated felony category has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act, 8 U.S.C. § 1182(a). *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005). Because the respondent is removable as an alien convicted of sexual abuse of a minor, *Matter of Blake* precludes him from obtaining a section 212(c) waiver, without regard to discretionary considerations. The Immigration Judge determined, in accordance with the rationale set forth in the Board's decision in *Matter of Blake*, *supra*, that section 212(c) relief was unavailable to the respondent. *See also* 8 C.F.R. § 1212.3(f)(5). We find no reversible error in this determination. The reasoning was rejected by the Second Circuit in *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007), but has been accepted by three other circuits.

Ramora-Mallari [sic] *v. Mukasey*, 514 F.3d 679 (7th Cir. 2008); *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007); *Brieva-Perez v. Gonzales*, 23 I&N Dec. 766 (BIA 2005), *aff'd*, 482 F.3d 356 (5th Cir. 2007).

We note, moreover, that the rationale underlying *Matter of Blake, supra*, has been expressly ratified in precedent decisions of the Eleventh Circuit, in whose jurisdiction this proceeding arises. *Farquharson v. U.S. Atty. Gen.*, 246 F.3d 1317, 1324-25 (11th Cir. 2001); *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1458-60 (11th Cir. 1994). As the aggravated felony ground of removal applicable in this case, sexual abuse of a minor under section 101(a)(43)(A) of the Act, has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act, the aggravated felony charge cannot be waived as a ground for deportability under former section 212(c). We agree with the Immigration Judge that the respondent is not eligible to apply for a section 212(c) waiver. Accordingly, we need not address the remaining arguments presented on appeal; the appeal is dismissed.

/s/ [illegible]
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Orlando, Florida

File A 42 086 274
March 16, 2007
IN REMOVAL PROCEEDINGS

In the Matter of

DE LA ROSA, JOSE ERASMO
Respondent

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act in that at any time after admission you have been convicted of an aggravated felony as defined in Section 101(A)(43)(A) of the Immigration and Nationality Act relating to murder, rape or sexual abuse of a minor.

Section 237(a)(2)(A)(i) of the Immigration and Nationality Act in that you are an alien who at any time after entry has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect or child abandonment.

APPLICATION: 212(c) waiver.

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Wilfred Calero, Esquire 1802 N. Alafaya Trail Orlando, Florida 32826	Yon K. Alberdi, Esquire Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent was issued with his Notice to Appear dated May 17, 2004. The Notice to Appear states that the respondent has been admitted to the United States and it states further he was admitted to the United States on or about March 5, 1989, as an immigrant. The allegation 4 of the Notice to Appear states that the respondent was, on December 30, 1995, convicted in the Circuit Court for Orange County, Florida, for the offense of lewd act upon a child under 16, in violation of Florida statute 800.04(3). The respondent has admitted the allegations in the Notice to Appear and he conceded the two charges of removability. Based upon the respondent's own admissions and the record, I conclude that the respondent's removability has been established, on both charges.

The respondent submitted an application for 212© [sic] waiver. This has been marked as Exhibit 2 of the Court's record. The Government counsel submitted the Immigrant Visa Alien Registration document showing that the respondent was in fact admitted as an immigrant. This is marked as Exhibit 3. The copies of the conviction records and Court documents from the respondent's convictions and arrests were marked as Group Exhibit 4. All other documents in the file were marked as Group Exhibit 5. All of these will be admitted into evidence.

The issue of removability having been resolved, the sole issue before the Court is whether the respondent's application for relief from removal should be granted.

With respect to the respondent's application for the relief that he is seeking, being the 212(c) waiver, the Government counsel has made a motion to pretermit the respondent's application for 212(c) waiver. The Court will grant the Government counsel's motion to pretermit the 212(c) waiver. Government counsel's Motion is based upon the Board of Immigration Appeals decision in the *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005). In this decision, the Board stated that an alien who is removable on the basis of his conviction for sexual abuse of a minor is ineligible for a waiver under former Section 212(c) of the Immigration and Nationality Act because the aggravated felony ground of removal with which he was convicted has no statutory counterpart in the grounds of inadmissibility under Section 212 (a) of the Act. As I stated, the respondent was convicted of a lewd act upon a child which in the Court papers is reflected as sexual abuse of a minor, and the specific language is a minor under the age of 16 years. The record will reflect that the child was in this case was 14 years old. Based upon that, the Court concludes that the decision in the *Matter of Blake* applies to the respondent's case, therefore, making him ineligible to seek 212(c) waiver.

Since the respondent is not requesting any other relief, the Court will pretermit the respondent's application since he is not eligible for 212 (c) waiver.

Since he is not seeking any other relief from removal at this time and the Court has not found that he is eligible for any other relief at this time, the following order will be entered.

ORDER

IT IS HEREBY ORDERED that the respondent's application for 212(c) waiver under former Section 212(c) of the Immigration and Nationality Act be pretermited.

IT IS HEREBY FURTHER ORDERED that the respondent shall be removed from the United States to the country of his citizenship, the Dominican Republic, on the two charges in the Notice to Appear.

/s/_____
VICTORIA L. GHARTEY
Immigration Judge
March 16, 2007

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BRADENTON, FLORIDA

File No. A 42 086 274
IN BOND PROCEEDINGS
Date: July 16, 2004

In the Matter of

DE LA ROSA, JOSE ERASMO
Respondent

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF SERVICE:
Wilfred Calero 5575 S. Semoran Blvd., Suite 1 Orlando, Florida 32822	Assistant Chief Counsel Trial Attorney Unit-DHS[1] 515 11th Street West Bradenton, Florida 34205-7727

BOND MEMORANDUM

The Respondent is a 31-year-old native and citizen of the Dominican Republic. Although no Notice to Appear has been filed yet, the I-213 indicates that the Re-

[1] The Homeland Security Act of 2002, as amended, transferred the enforcement, services, and administrative functions of the Immigration and Naturalization Service ("Service") to the Department of Homeland Security ("Department"). 68 Fed. Reg. 9824 (2003).

spondent entered the United States on March 5, 1989, in New York City, New York as Lawful Permanent Resident ("LPR"). On August 25, 1998, the Respondent filed a form N-600, Application for Naturalization, which is still pending. The I-213 also indicates that on December 13, 1995, the Respondent was convicted in the Circuit Court in and for Orange County, Florida for the offense of Lewd Act upon a Child under 16 years of age in violation of Florida Statute 800.04(3). For this offense, the Respondent was sentenced to 3 years of supervised probation. In April 1998, the Respondent violated his probation and was sentenced to 2 more years of supervised probation. On March 10, 1998, the Respondent was arrested and placed in jail. After pleading no contest to the offense of Resisting an Officer Without Violence, he was released from custody and adjudication of guilt was withheld.

The Respondent appeared before the Immigration Judge on July 14, 2004, and a bond hearing took place. The Immigration Judge, hearing all the relevant evidence reduced the bond from "No Bond" to $5,000. The Department now appeals that decision.

The Respondent's criminal conviction places him under section 236(c) of the Act. Section 236(c)(1)(B) of the Act provides for mandatory custody of any alien convicted of an aggravated felony. However, aliens released from custody prior to the expiration of the Transition Period Custody Rules ("TPCR") are not subject to mandatory custody. *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999). The TPCR expired on October 8, 1998. *See Id.* The Respondent was last released from custody in March 1998. Therefore, the Respondent is not subject to mandatory custody under section 236(c) of the Act.

Because section 236(c) of the Act is inapplicable in the Respondent's case, section 236(a) of the Act governs. *See Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999). Under section 236(a)(2)(A) of the Act, the Respondent may be released on bond. *See* INA § 236(a)(2)(A). However, pursuant to 8 C.F.R. § 236.1(c)(8) (1999), a criminal alien in a custody determination under section 236(a) of the Act must establish that he or she does not present a danger to property or persons and that he or she is likely to appear for any future proceeding. *Id.*

The Respondent is a 31-year-old native and citizen of the Dominican Republic. He came to the United States as a LPR in 1989 and has resided in the United States for fifteen years. He lives in Orlando with his Mexican wife. The Respondent is the father of two USC children. His LPR mother, United States Citizen father, three brothers, and three sisters all live in the United States. The Respondent owns two automobiles and a home in Orlando. The Respondent is employed.

After hearing all the evidence, the Court concluded that the Respondent is the father of two USC children and has lived in and established positive ties in the Orlando community for many years. In addition, the Respondent has the support of his family in the United States, a good work history, and it appears that the Respondent has been rehabilitated. The Respondent does not present a risk of flight nor a danger to his community.

The Immigration Judge considered the following evidence when making the bond determination: the judgment and conviction records, I-213, and the admissions of the Respondent.

Dated this 16th day of June, 2004.

/s/ R. Kevin McHugh
Honorable R. Kevin McHugh
UNITED STATES IMMIGRATION JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13861-FF
Agency No. A42-086-274

JOSE ERASMO DE LA ROSA,
Petitioner,

v.

U.S. ATTORNEY GENERAL,
Respondent.

On Petition for Review of a Final Order of the
Board of Immigration Appeals

[STAMP: FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 07 2008
THOMAS K. KAHN
CLERK]

BEFORE: BIRCH, DUBINA, and BLACK, Circuit Judges.

BY THE COURT:

Because Petitioner has not and cannot demonstrate that the Board's June 10, 2008, order is based on a clear-cut error of established law, Petitioner's motion to stay his removal is DENIED. *See Weng v. Attorney General*, 287 F.3d 1335, 1340 (11th Cir. 2002) (*per curiam*).

In the absence of binding precedent which directly addresses and resolves the issue Petitioner raises in his motion, the Attorney General's motion for summary affirmance is DENIED.

APPENDIX F

EXCERPTS OF THE ADMINISTRATIVE RECORD BEFORE THE BOARD OF IMMIGRATION APPEALS

February 15, 2005 Hearing Before Immigration Judge Victoria Ghartey (AR 46-52)

* * *

JUDGE TO MR. CALERO

Q. So, he's denying the second charge?

A. Yes, Your Honor.

Q. And he's seeking what relief?

A. 212(c), Your Honor.

* * *

JUDGE TO MS. RAMIREZ

Q. Ms. Ramirez, any comments on the respondent's indication that he's seeking 212(c) relief?

A. He appears eligible. * * *

Q. Ms. Ramirez, speak up.

A. Okay. I said, Your Honor, that it appears that he's eligible * * *

* * *

JUDGE FOR THE RECORD

* * * Okay, so I have the application for 212(c) here. I will mark that as Exhibit 2 of the Court's record. * * * We'll schedule this for individual hearing.

* * *

March 16, 2007 Hearing Before
Immigration Judge Victoria Ghartey
(AR 57-62)

JUDGE FOR THE RECORD

* * * This is a continuation of removal hearing before Immigration Judge Victoria Ghartey[.] * * * I rescheduled this for you to talk to the respondent the last time that we met. The question of the respondent's statutory eligibility was discussed, for 212(c) was discussed, and the respondent attorney was informed that because of the Board decision in the Matter of Blake, the respondent would not be able to seek 212(c) waiver at this time. * * *

JUDGE TO MR. ALBERDI

Q. Okay, is there any comment, motion from either side, Government? Any motion from the Government?

A. The Government would move to pretermit it all pending relief at this time, pursuant to Matter of Blake, issued by the BIA. The respondent is not eligible for 212(c) due to his conviction for sexual abuse of a minor. The Government asks that all relief be pretermitted at this time and that the respondent be ordered removed from his country of citizenship, the Dominican Republic.

* * *

APPENDIX G

REPRESENTATIVE CASES ADDRESSING SECTION 212(C) ELIGIBILITY IN LIGHT OF *MATTER OF BLAKE*

FIRST CIRCUIT

Gonzalez-Mesias v. *Mukasey*, 529 F.3d 62 (1st Cir. 2008)

Dalombo Fontes v. *Gonzales*, 483 F.3d 115 (1st Cir. 2008)

Kim v. *Gonzales*, 468 F.3d 58 (1st Cir. 2006)

Matter of Sanchez, 2008 WL 3919110 (BIA July 29, 2008)

Matter of Hercules, 2008 WL 3919079 (BIA July 23, 2008)

Matter of Jacques, 2007 WL 2463895 (BIA July 25, 2007)

Matter of Pimentel, 2006 WL 2803375 (BIA July 26, 2006)

SECOND CIRCUIT

Webster v. *Mukasey*, 259 Fed. Appx. 375 (2d Cir. 2008)

Blake v. *Carbone*, 489 F.3d 88 (2d Cir. 2007)

Matter of Mejicanos-Estrada, 2008 WL 2517578 (BIA June 6, 2008)

Matter of Vargas-Gonzalez, 2008 WL 655900 (BIA Feb. 11, 2008)

Matter of Penalo-Almonte, 2007 WL 2463986 (BIA July 31, 2007)

Matter of Shakeri, 2006 WL 901562 (BIA Mar. 10, 2006)

Matter of Bo Feng, 2006 WL 901498 (BIA Mar. 9, 2006)

Matter of Donaldson, 2005 WL 3802267 (BIA Nov. 28, 2005)

THIRD CIRCUIT

Francois v. *Mukasey*, 264 Fed. Appx. 211 (3d Cir. 2008)

Sudol v. *Mukasey*, 300 Fed. Appx. 157 (3d Cir. 2008)

Caroleo v. *Gonzales*, 476 F.3d 158 (3d Cir. 2007)

Birkett v. *Mukasey*, 252 Fed. Appx. 516 (3d Cir. 2007)

Calderon-Minchola v. *Mukasey*, 258 Fed. Appx. 425 (3d Cir. 2007)

Matter of Evelyn, 2007 WL 4711417 (BIA Dec. 21, 2007)

Matter of Colato, 2006 WL 448280 (BIA Jan. 25, 2006)

Matter of Singh, 2006 WL 448165 (BIA Jan. 18, 2006)

Matter of Martinez-Madrid, 2005 WL 1111829 (BIA Apr. 20, 2005)

FIFTH CIRCUIT

Leon-Medina v. *Holder*, 2009 WL 3489616 (5th Cir. Oct. 29, 2009)

Popoca v. *Holder*, 320 Fed. Appx. 252 (5th Cir. 2009)

Cantu v. *Mukasey*, 267 Fed. Appx. 321 (5th Cir. 2008)

Ruiz v. *Mukasey*, 296 Fed. Appx. 429 (5th Cir. 2008)

Felix v. *Mukasey*, 290 Fed. Appx. 764 (5th Cir. 2008)

Firoozfar v. *Mukasey*, 292 Fed. Appx. 371 (5th Cir. 2008)

Garza-Garcia v. *Mukasey*, 293 Fed. Appx. 282 (5th Cir. 2008)

Melgar v. *Mukasey*, 294 Fed. Appx. 174 (5th Cir. 2008)

Pham v. *Mukasey*, 297 Fed. Appx. 335 (5th Cir. 2008)

Cruz-Marquina v. *Mukasey*, 303 Fed. Appx. 243 (5th Cir. 2008)

Vo v. *Gonzales*, 482 F.3d 363 (5th Cir. 2007)

Avilez-Granados v. *Gonzales*, 481 F.3d 869 (5th Cir. 2007)

Brieva-Perez v. *Gonzales*, 482 F.3d 356 (5th Cir. 2007)

De la Paz Sanchez v. *Gonzales*, 473 F.3d 133 (5th Cir. 2006)

Matter of Villarreal-Perez, 2009 WL 1800073 (BIA June 5, 2009)

Matter of Bright, 2008 WL 5537804 (BIA Dec. 23, 2008)

Matter of Lozano-Torres, 2008 WL 5181736 (BIA Nov. 21, 2008)

Matter of Trevino-Hernandez, 2008 WL 5181797 (BIA Nov. 14, 2008)

Matter of Ramcharran, 2008 WL 4420107 (BIA Sept. 23, 2008)

Matter of Reyes-Huereca, 2008 WL 486877 (BIA Jan. 29, 2008)

Matter of Huynh, 2007 WL 4182297 (BIA Oct. 16, 2007)

Matter of Franco, 2007 WL 2074494 (BIA June 11, 2007)

Matter of Gardea-Perez, 2007 WL 275815 (BIA Jan. 18, 2007)

Matter of Castillo-Salinas, 2006 WL 3485843 (BIA Oct. 12, 2006)

Matter of Dominguez-Vega, 2006 WL 3088960 (BIA Sept. 8, 2006)

SIXTH CIRCUIT

Koussan v. *Holder*, 556 F.3d 403 (6th Cir. 2009)

Thap v. *Mukasey*, 544 F.3d 674 (6th Cir. 2008)

United States v. *Valencia-Perez*, 2005 WL 2436453 (W.D. Mich. Oct. 3, 2005)

Matter of Erb, 2007 WL 4699927 (BIA Dec. 11, 2007)

Matter of Cisneros-Garcia, 2006 WL 3712434 (BIA Nov. 28, 2006)

SEVENTH CIRCUIT

De Leon v. *Holder*, 2009 WL 1811219 (7th Cir. June 25, 2009)

Zamora-Mallari v. *Mukasey*, 514 F.3d 679 (7th Cir. 2008)

Valere v. *Gonzales*, 473 F.3d 757 (7th Cir. 2007)

Ryan v. *Gonzales*, 222 Fed. Appx. 528 (7th Cir. 2007)

Matter of Baptiste, 2007 WL 4707376 (BIA Dec. 14, 2007)

Matter of Ghonim, 2007 WL 1794209 (BIA May 30, 2007)

Matter of Dominguez-Arizmendi, 2007 WL 1724850 (BIA May 22, 2007)

Matter of Arellano-Vasquez, 2006 WL 2008248 (BIA May 24, 2006)

EIGHTH CIRCUIT

Soriano v. *Gonzales*, 489 F.3d 909 (8th Cir. 2007)

Vue v. *Gonzales*, 496 F.3d 858 (8th Cir. 2007)

Matter of Mancillas-Ruiz, 2009 WL 3250427 (BIA Sept. 28, 2009)

Matter of Gonzales-Aguilar, 2007 WL 1676901 (BIA May 17, 2007)

NINTH CIRCUIT

United States v. *Moriel-Luna*, __ F.3d __, 2009 WL 3461925 (9th Cir. Oct. 29, 2009)

Abebe v. *Holder*, 554 F.3d 1203 (9th Cir. 2009)

Kwong v. *Holder*, 2009 WL 2981875 (9th Cir. Sept. 17, 2009)

Mendez-Hernandez v. *Holder*, 332 Fed. Appx. 443 (9th Cir. 2009)

Eski v. *Mukasey*, 266 Fed. Appx. 669 (9th Cir. 2008)

Judulang v. *Gonzales*, 249 Fed. Appx. 499 (9th Cir. 2007)

Maaref v. *Gonzales*, 240 Fed. Appx. 202 (9th Cir. 2007)

Sosa v. *Gonzales*, 234 Fed. Appx. 777 (9th Cir. 2007)

Rodriguez-Mata v. *Gonzales*, 235 Fed. Appx. 557 (9th Cir. 2007)

Matter of Obrique, 2008 WL 2401056 (BIA May 23, 2008)

Matter of Rodriguez-Rodriguez, 2008 WL 2401052 (BIA May 23, 2008)

Matter of Kawamura, 2008 WL 1734661 (BIA Mar. 28, 2008)

Matter of Quoc Bui, 2008 WL 762666 (BIA Mar. 6, 2008)

Matter of Castillo, 2008 WL 486908 (BIA Jan. 30, 2008)

Matter of Arellano-De Fitzpatrick, 2007 WL 2463888 (BIA July 24, 2007)

Matter of Nungaray-Guardado, 2007 WL 1676940 (BIA May 21, 2007)

Matter of Lopez-Loera, 2007 WL 1114110 (BIA Mar. 27, 2007)

Matter of Vergara-Ramirez, 2007 WL 1125658 (BIA Feb. 23, 2007)

Matter of Aldaco-Zarate, 2007 WL 275735 (BIA Jan. 11, 2007)

Matter of Gonzalez, 2006 WL 3922219 (BIA Dec. 14, 2006)

Matter of Escobedo-Cortinez, 2006 WL 3712532 (BIA Dec. 7, 2006)

Matter of Gonzalez-Uribe, 2006 WL 3712539 (BIA Dec. 6, 2006)

Matter of Cabarle, 2006 WL 3203691 (BIA Aug. 31, 2006)

Matter of Contreras-Vega, 2006 WL 3252538 (BIA Aug. 17, 2006)

Matter of Bueno, 2006 WL 3088798 (BIA Aug. 9, 2006)

Matter of Paredes-Osuna, 2006 WL 2803403 (BIA Aug. 1, 2006)

Matter of Knust De Meester, 2006 WL 2183533 (BIA June 20, 2006)

Matter of Garcia-Garcia, 2006 WL 2183535 (BIA June 20, 2006)

Matter of Rodriguez-Rocha, 2006 WL 2008216 (BIA May 18, 2006)

Matter of Agbayani Agbayani, 2006 WL 1647443 (BIA May 15, 2006)

Matter of Delos Reyes, 2006 WL 901514 (BIA Mar. 8, 2006)

Matter of Banuelos-Delena, 2006 WL 901335 (BIA Mar. 2, 2006)

Matter of Gomez-Perez, 2006 WL 901334 (BIA Mar. 1, 2006)

Matter of Mendez Camarillo, 2006 WL 448304 (BIA Jan. 26, 2006)

Matter of Aigner, 2006 WL 448285 (BIA Jan. 25, 2006)

Matter of Carreon-Garcia, 2006 WL 448269 (BIA Jan. 24, 2006)

Matter of Martinez, 2006 WL 448175 (BIA Jan. 17, 2006)

Matter of Rodriguez-Contreras, 2006 WL 448178 (BIA Jan. 17, 2006)

Matter of Cardona, 2005 WL 3709244 (BIA Dec. 27, 2005)

Matter of Cruz-Bravo, 2005 WL 3709363 (BIA Dec. 19, 2005)

Matter of Palomares-Quintero, 2005 WL 3952748 (BIA Aug. 30, 2005)

Matter of Parada-Chicas, 2005 WL 1766768 (BIA May 4, 2005)

Matter of Hernandez-Vanegas, 2005 WL 1111836 (BIA Apr. 21, 2005)

TENTH CIRCUIT

Falaniko v. *Mukasey*, 272 Fed. Appx. 742 (10th Cir. 2008)

Alvarez v. *Mukasey*, 282 Fed. Appx. 718 (10th Cir. 2008)

Matter of Arellano Garcia, 2009 WL 3250483 (BIA Sept. 21, 2009)

Matter of Filo Lomu, 2005 WL 3802278 (BIA Nov. 25, 2005)

ELEVENTH CIRCUIT

Garcia v. *Mukasey*, 309 Fed. Appx. 306 (11th Cir. 2009)

Barton v. *Att'y General*, 2009 WL 1606823 (11th Cir. June 10, 2009)

Sanchez-Becerra v. *Mukasey*, 289 Fed. Appx. 352 (11th Cir. 2008)

Palomino-Abad v. *Gonzales*, 229 Fed. Appx. 891 (11th Cir. 2007)

Rubio v. *Gonzales*, 182 Fed. Appx. 925 (11th Cir. 2006)

Matter of Romero-Garcia, 2008 WL 5244672 (BIA Nov. 25, 2008)

Matter of Hamdallah, 2008 WL 5181728 (BIA Nov. 21, 2008)

Matter of Tadesse Desta, 2006 WL 3485618 (BIA Oct. 17, 2006)

Matter of Rodriguez, 2006 WL 2803398 (BIA Aug. 3, 2006)

Matter of Dickson, 2006 WL 901555 (BIA Mar. 13, 2006)

APPENDIX H

STATUTORY PROVISIONS

Section 212(a) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1182, provides in relevant part:

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

Former Section 212(c) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1182(c) (1996), repealed April 1, 1997, provides in relevant part:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section .... The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Section 231 (formerly Section 241) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1227, provides in relevant part:

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status un-

der section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. § 1101(a)(43) provides in relevant part:

The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

* * *

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

* * *

The term applies to an offense described in this paragraph whether in violation of Federal or State law

and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

APPENDIX I

REGULATORY PROVISIONS

8 C.F.R. § 1212.3(f)(5) provides in relevant part:

An application for relief under former section 212(c) of the Act shall be denied if:

* * *

(5) The alien is deportable under former Section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

APPENDIX J

Matter of JUAN REYNALD DAVILA MUNOZ
a.k.a. Juan Reynaldo Davila

File: A35 279 774 – Houston

Board of Immigration Appeals

28 Immig. Rptr. B1-1

AUG 07 2003

HOLDING

The BIA sustained respondent's appeal in part and dismissed it in part, finding that respondent did not obtain citizenship at birth but that he was eligible to apply for a waiver of inadmissibility under former § 212(c) of the INA. With regard to respondent's citizenship claim, the BIA found insufficient evidence to support the finding that respondent's father had lived in the U.S. for 5 years after he turned 16 but prior to the time of respondent's birth, elements necessary to prove citizenship by birth. With regard to respondent's eligibility for a waiver of inadmissibility, the BIA found that respondent fell squarely within the class of persons covered by *INS* v. *St. Cyr*, 533 U.S. 289 (2001) who are entitled to seek a waiver under former § 212(c) of the INA in removal proceedings. The BIA also found that the absence of a specific aggravated felony ground in § 212(a) of the INA did not preclude respondent from obtaining a § 212(c) waiver since there is a corresponding ground of inadmissibility to the crime of aggravated assault on a peace officer in § 212(a)(2)(A)(i)(I) of the INA, conviction of a crime involving moral turpitude. Although the BIA previously rejected this "corre-

sponding ground" analysis, it found it appropriate in this case, given the fact that Congress had allowed those aggravated felons who served less than 5 years in prison to be eligible for relief through former § 212(c) relief. Based on these findings, the BIA remanded the record to allow respondent to apply for a waiver of inadmissibility.

SUMMARY OF ISSUES

CITIZENSHIP: The BIA found that respondent did not automatically acquire citizenship at birth through his father since he was unable to present enough evidence to show that his father had lived in the U.S. for 5 years after he turned 16 but prior to the time of respondent's birth, elements necessary to prove citizenship by birth.

WAIVER OF INADMISSIBILITY: The BIA found that respondent, an aggravated felon who was convicted of aggravated assault on a peace officer, was eligible for a waiver of inadmissibility under former § 212(c) of the INA as a result of the Supreme Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001) and the fact that a corresponding ground of inadmissibility was present in § 212(a)(2)(A)(i)(I) of the INA.

FACTS

Respondent, a native and citizen of Mexico, entered the U.S. in 1976 as a lawful permanent resident. In 1991, he was convicted of aggravated assault on a peace officer. In 1998, DHS (formerly INS) initiated removal proceedings against him. Respondent denied the allegations against him, contending that he acquired U.S. citizenship at birth through his father. The IJ continued the case several times to allow DHS to consider respondent's Application for Certificate of Citizenship.

DHS denied the application, finding that respondent failed to present enough evidence to show that his father met the 10 year residency requirement. The IJ also found that respondent had not submitted enough evidence to establish that he acquired U.S. citizenship at birth. Last, the IJ found that respondent was ineligible for a waiver of inadmissibility under former § 212(c) of the INA because there was no corresponding ground of exclusion in § 212(a) for the aggravated felony ground with which he was charged. Respondent appealed.

CROSS-REFERENCES

Immigration Law and Procedure chaps. 1, 2, 74, 91, 98.

COUNSEL: COUNSEL: ON BEHALF OF RESPONDENT: Kaye Ellis Stone, Esquire

ON BEHALF OF DHS: Merilee Fong, Assistant District Counsel

Before: Patricia A. Cole, Board Member

OPINION BY: Cole, Board Member.

OPINION: On March 20, 2003, an Immigration Judge found that the respondent had failed to present sufficient evidence to show that he was a United States citizen and determined that the respondent was ineligible to apply for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The respondent has appealed from this decision. The appeal will be sustained in part and dismissed in part, and the record will be remanded to the Immigration Judge for further proceedings consistent with this order.

I. BACKGROUND

The respondent was born in Mexico on October 28, 1952 and was admitted to the United States as a lawful permanent resident on March 2, 1976. On July 1, 1991, he was convicted of aggravated assault on a peace officer. He was sentenced to 2 years in prison for this crime. In addition, on December 15, 1998, the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) initiated removal proceedings against him by filing a Notice to Appear with the immigration court. The respondent denied all of the allegations against him, including the allegation that he was not a citizen of the United States. The respondent claimed that his father was born in the United States and that his father had resided here for at least 10 years before the respondent's birth. The respondent therefore argued that he acquired United States citizenship automatically at birth through his father. *See* section 201 (g), Nationality Act of 1940, 8 U.S.C. § 1151(g)(1940).[1]

The Immigration Judge continued the respondent's case to allow him to file an Application for Certificate of Citizenship (N-600) with the DHS. The DHS, however, denied the application on April 3, 2000. The DHS found that the respondent had failed to present sufficient evi-

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[1] Because the respondent was born before December 24, 1952, he is subject to section 201(g) of the Nationality Act of 1940 rather than section 301 (g) of the Immigration and Nationality Act, 8 U.S.C. § 1401(g), the more recent provision. Section 201(g) states that an alien's parent must have resided in the United States for 10 years before the alien's birth, 5 of which were after the alien's parent turned 16 before the alien can become a citizen at birth. *See* section 201(g) of the Nationality Act.

dence to show that his father met the 10 year residency requirement. *See* Exhibit 5. Nevertheless, the DHS granted the respondent's brother's Application for Certificate of Citizenship on April 25, 2003. *See* Exhibit 7A (documents obtained from DHS through Freedom of Information Act request). The respondent therefore attempted to have the DHS reconsider his application. Both the Immigration Judge and the DHS attorney at the respondent's hearing agreed that reconsideration was appropriate, and the Immigration Judge continued the respondent's case several times to allow the DHS to conduct its review (Tr. at 11-14, 17-18, 21-23).

After assessing the evidence the respondent's brother had submitted in support of his application, the DHS found no basis for reversing its original ruling in the respondent's case. *See* Exhibit 9 (Memorandum from Debra K. Lewis to File). The Immigration Judge also found that the respondent had not submitted enough evidence to establish that he acquired United States citizenship at birth (I.J. at 2-4). In addition, the Immigration Judge found that the respondent was ineligible for a waiver of inadmissibility under former section 212(c) of the Act because there was no corresponding ground of exclusion in section 212(a) of the Act for the aggravated felony ground in section 237(a) of the Act under which he was charged (I.J. at 4-5). The respondent has appealed from each of these findings.

II. CITIZENSHIP

In the case of an alien like the respondent who has been admitted to the United States, the burden is on the DHS to establish removability. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A). This burden includes establishing alienage, and the DHS

met that burden in the respondent's case by establishing his foreign birth. *See* Exhibit 4A (respondent's birth certificate); *Matter of Leyva*, 16 I&N Dec. 118, 119 (BIA 1977) (finding that evidence of foreign birth gives rise to a rebuttable presumption of alienage and shifts the burden to the respondent to produce some evidence of citizenship); *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327 (BIA 1969). The respondent therefore must present some evidence of citizenship to overcome the DHS's proof of alienage. *See Matter of Leyva, supra*; *Matter of Tijerina-Villarreal, supra.*

The respondent claims on appeal that his evidence is sufficient to show that his father met the residence requirements of section 201(g) of the Nationality Act of 1940, but we disagree. Like the Immigration Judge, we find insufficient evidence in the record to show that the respondent's father resided in the United States for 5 years after he reached age 16 and before the respondent was born on October 28, 1952. The respondent's father testified during the respondent's brother's immigration proceeding and indicated that he left the United States in 1932 and then returned to this country to work in 1949 or 1950. *See* Exhibit 13, Transcript of Respondent's Brother's Proceedings, at 30, 32-33. In an affidavit, the respondent's father stated that he came to the United States for a few months each year between 1945 and 1951 to do seasonal agricultural work and then returned to this country almost full-time starting in 1951 or 1952. *See* Exhibit 7A, at 20-22. Under either of these scenarios, we cannot conclude that the respondent's father was in the United States for 5 years between 1943, the year he turned 16 years old, and October 28, 1952, the date the respondent was born. And the other evidence of record does not alter this conclu-

sion. *See, e.g.*, Exhibits 6, 7, 10B, 13; *see also Matter of Tijerina-Villarreal, supra*, at 330-31.

Moreover, the fact that the respondent's brother was able to obtain a certificate of citizenship does not necessarily establish that the respondent is eligible. The respondent's brother was born in 1960 and therefore is subject to slightly different requirements. *See* section 301(g) of the Act, 8 U.S.C. § 1401(g). In addition, he only had to show that his father was in this country for 5 years between 1941 and his birth in 1960. He therefore had an additional 8 years within which to establish his father's presence. In this case, it appears that the extra 8 years was critical to his case.

In light of the above, we find that the Immigration Judge was correct to conclude that the respondent's evidence is not sufficient to rebut the presumption of alienage in his case. We therefore affirm the Immigration Judge's ruling on this issue and find that the respondent is subject to removal.

III. SECTION 212(c) WAIVER

On the other hand, we find that the Immigration Judge erred in pretermitting the respondent's application for a waiver of inadmissibility under former section 212(c) of the Act. First, the respondent falls squarely within the class of persons covered by the United States Supreme Court's ruling in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). The respondent is a lawful permanent resident with well over 7 years' lawful domicile in this country and he pled guilty to his offense before Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of

Pub. L. No. 104-208, 110 Stat 3009-546 ("IIRIRA"). He therefore is entitled to seek a waiver under former section 212(c) of the Act in removal proceedings.

And the absence of a specific aggravated felony ground in section 212(a) of the Act does not prevent the respondent from obtaining a section 212(c) waiver. Generally, a waiver under former section 212(c) of the Act was only available to waive grounds of deportability that had corresponding grounds of inadmissibility in section 212(a) of the Act. *See Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (A.G. 1991). Nevertheless, we have found that an alien convicted of an aggravated felony may be eligible for a waiver under section 212(c) of the Act when the conviction could also lead to inadmissibility under section 212(a) of the Act *See Matter of Meza*, 20 I&N Dec. 257, 259 (BIA 1991). In *Meza, supra*, we rejected the principle that a section 212(c) waiver is unavailable to an alien convicted of an aggravated felony simply because no ground of exclusion expressly recites the words "convicted of an aggravated felony." *Id.* The alien in *Meza, supra*, had been convicted of a drug trafficking crime, an aggravated felony, and would have been inadmissible under then-section 212(a)(23) of the Act as result of the conviction. We found that, in light of the corresponding section 212(a)(23) ground of inadmissibility, the respondent was not precluded from establishing eligibility for section 212(c) relief.

In this case, the respondent was convicted of aggravated assault on a peace officer, an offense that currently qualifies as a crime of violence under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) and an aggravated felony. This offense also could make the respondent inadmissible under section 212(a)(2)(A)(i)(I) of the Act as an alien convicted of a crime involving

moral turpitude. Thus, there is a "corresponding" ground of inadmissibility for the respondent's offense, and, under the reasoning in *Matter of Meza, supra*, the respondent is not precluded from establishing eligibility for section 212(c) relief.

The Immigration Judge dismissed this type of "corresponding ground" analysis based on our ruling in *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984). In that case, we held that an alien who was deportable under then-section 241(a)(5) of the Act as an alien convicted under 18 U.S.C. § 1546 could not apply for a section 212(c) waiver because there was no corresponding ground of inadmissibility under section 212(a) of the Act. The respondent in that case argued that his offense was also a crime involving moral turpitude and therefore could make him inadmissible under one of the provisions in section 212(a), but we declined to follow this analysis. We found that not all offenses covered by section 241(a)(5) were crimes involving moral turpitude and that we therefore could not extend section 212(c) to cover this ground of deportability. *See Matter of Wadud, supra*, at 184-5.

The present case, however, is distinguishable from *Matter of Wadud, supra*, in a very significant way. The ground of removability in this case is the aggravated felony ground, section 237(a)(2)(A)(iii) of the Act rather than former section 241(a)(5) of the Act. And the language of former section 212(c) of the Act specifically acknowledged that some aliens convicted of aggravated felonies would be eligible to apply for relief. The last sentence of former section 212(c) read: "[t]he first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." *See* section 212(c) of

the Act. By eliminating this category of aliens from the class of persons eligible for section 212(c) relief, this provision also indicated that aliens who did not meet this requirement, namely aliens who were convicted of aggravated felonies but served less than 5 years in prison were allowed to apply for a section 212(c) waiver. These aliens, however, would only have been able to seek section 212(c) waivers if the rationale of *Matter of Meza*, *supra* was applied to their cases. Because it is doubtful that Congress would have added a provision addressing a category of individuals who were already ineligible for relief, it is only logical to conclude that aliens charged under the aggravated felony ground of deportability are eligible for section 212(c) waivers if their crimes fall under one of the grounds contained in section 212(a) of the Act. Because other grounds of deportability without corresponding grounds of inadmissibility were not specifically mentioned in section 212(c), this rationale does not apply to situations like the one presented in *Matter of Wadud*, *supra* or to cases involving aliens charged with deportability on the basis of firearms convictions. *See, e.g.*, *Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995); *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992); *see also Cato* v. *INS*, 84 F.3d 597 (2d Cir. 1996). Accordingly, we do not find that our rulings in those cases are binding in this context.

Moreover, we note that the Supreme Court in *INS* v. *St. Cyr*, *supra*, accepted as a given that aliens convicted of aggravated felonies were able to apply for section 212(c) waivers. *See INS* v. *St. Cyr*, *supra*, at 295-298 (finding that section 212(c) waivers have great practical importance in deportation proceedings because the class of aliens who are deportable for crimes, particularly for aggravated felonies, is quite broad).

And many aliens, like the respondent, who were made eligible for section 212(c) waivers by *INS* v. *St. Cyr*, *supra*, were not even removable as aggravated felons until Congress expanded the definition of "aggravated felony" in the IIRIRA. The inclusion of these aliens in the class of individuals allowed to apply for section 212(c) relief therefore appears to be required under the reasoning of *INS* v. *St. Cyr*, *supra*, notwithstanding our ruling in *Matter of Meza*, *supra*.

The number of aliens affected by this ruling, however, is comparably small. Section 240A(a) of the Act, which has replaced former section 212(c) of the Act, makes any alien who has been convicted of an aggravated felony ineligible for cancellation of removal. *See* section 240A(a)(3) of the Act, 8 U.S.C. § 1229b(a)(3). Thus, aliens in removal proceedings who do not meet the requirements of *INS* v. *St. Cyr*, *supra*, which will be most aliens, will be ineligible for relief if they have been convicted of an aggravated felony or felonies. And aliens who do qualify for section 212(c) under *INS* v. *St. Cyr*, *supra*, must still establish that they merit this form of relief in the exercise of discretion.

Based upon the foregoing, we find that the respondent is entitled to apply for a waiver of inadmissibility under former section 212(c) of the Act. We therefore remand the record to the Immigration Judge to allow him to pursue this form of relief.

ORDER: The appeal is sustained in part and dismissed in part, and the record is remanded for further proceedings consistent with this order.

APPENDIX K

U.S. Department Of Justice

Decision of the Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A90 640 428 - Seattle Date: [STAMP: MAY 25 2005]

In re: MANUEL ALEJANDRO RANGEL-ZUAZO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Manuel F. Rios, III, Esquire

ON BEHALF OF DHS: Patricia A. Duggan
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony as defined in section 101(a)(43)(A), I&N Act [8 U.S.C. § 1101(a)(43)(A)]

APPLICATION: Section 212(c) waiver

The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) appeals the Immigration Judge's January 29, 2004, decision granting the respondent a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996). The respondent has filed an opposition. The appeal will be sustained, and the record will be remanded.

The respondent is a native and citizen of Mexico. His status was adjusted to that of a lawful permanent resident in 1990. On January 3, 1993, the respondent was convicted in a Washington State court upon a plea of guilty to one count of first-degree rape of a child in violation of Wash. Rev. Code § 9A.44.073 (1986).

The DHS challenges the Immigration Judge's exercise of discretion to grant the respondent a section 212(c) waiver. We, however, will dispose of the appeal on other grounds because intervening precedent renders the respondent statutorily ineligible for section 212(c) relief. 8 C.F.R. § 1003.1(e)(5).

To be statutorily eligible for a section 212(c) waiver, the respondent must establish, *inter alia*, that section 212(a) of the Act, 8 U.S.C. § 1182(a), contains a ground of inadmissibility that is comparable to the grounds upon which he is removable, namely for having been convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Act. *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; A.G. 1991), *aff'd*, 983 F.2d 231 (5th Cir. 1993); *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991); *see also* 8 C.F.R. § 1212.3(f)(5). In *Matter of Blake*, *supra*, the Board recently held that the aggravated felony ground of removal based on a conviction for sexual abuse of a minor has no statutory counterpart in section 212(a) of the Act. The same is true for the respondent's removability based on his conviction for first-degree rape of a child. In *Matter of Blake*, *supra*, the Board held that the test for determining whether a ground of removability has a statutory counterpart in section 212(a) of the Act "turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses." 23 I&N Dec. at 728. No provision in section

212(a) of the Act establishes inadmissibility for a rape that as a matter of law is sexual abuse of a minor. The fact that a conviction for rape of a child may often render an alien inadmissible under some provision of section 212(a) of the Act is not sufficient to meet the test for comparability. *Id.* at 729. Thus, section 212(a) of the Act does not contain a ground of inadmissibility that is comparable to the grounds upon which the respondent is removable. Accordingly, the respondent is not eligible for section 212(c) relief. We, thus, will sustain the DHS's appeal and will remand the record to the Immigration Judge for issuance of an order of removal pursuant to *Molina-Camacho* v. *Ashcroft*, 393 F.3d 937 (9th Cir. 2004).

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.

/s/ [illegible]
FOR THE BOARD

APPENDIX L

U.S. Department of Justice

Decision of Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A37 749 964—New York Date: [STAMP: May 9 2003]

In re: DOUGLAS ANTHONY ROWE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Eileen Collins Bretz, Esquire

ON BEHALF OF SERVICE: George J. Ward, Jr.
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)]
Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility

The parties have filed cross appeals from the Immigration Judge's decision to consider and deny the merits of the respondent's request for a waiver of inadmissibility pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). Both appeals will be dismissed.

The respondent asserts that the Immigration Judge erroneously denied his request for a waiver based on the unfounded conclusion that his equities do

not outweigh the adverse factors. The Immigration and Naturalization Service ("Service," now the Department of Homeland Security, DHS) asserts that the Immigration Judge erred in concluding that the respondent was eligible to apply for a section 212(c) waiver. The Service asserts that there is no comparable ground of inadmissibility available to an alien convicted of an aggravated felony, and that the respondent is therefore precluded from applying for a section 212(c) waiver. We will first address the Service's argument.

The Board has found that an alien convicted of an aggravated felony may be eligible for a waiver under section 212(c) where the conviction could also form the basis for an exclusion ground. *See Matter of Meza*, 20 I&N Dec. 257, 259 (BIA 1991). The Board rejected the principle that a 212(c) waiver is unavailable to an alien convicted of an aggravated felony simply because no ground of exclusion expressly recites the words "convicted of an aggravated felony." *See id.* In *Matter of Meza*, the alien had been convicted of a drug trafficking crime, an aggravated felony, and would have been inadmissible under section 212(a)(23) as result of the conviction. The Board found that, in light of the corresponding 212(a)(23) ground of inadmissibility, the respondent was not precluded from establishing eligibility for section 212(c) relief.

In this case, the respondent was convicted of second degree robbery, which presently could be considered an aggravated felony as either a crime of violence or a theft crime. *See* sections 101(a)(43)(F) and (G) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1101(a)(43)(F) and (G). In addition, the respondent's conviction could have formed the basis for an inadmissibility charge pursuant to section 212(a)(2)(A)(i)(I) of

the Act, as amended, as an alien convicted of a crime involving moral turpitude. Thus based on the precedent set forth in *Matter of Meza, supra*, the respondent is not precluded from establishing eligibility for section 212(c) relief. We are not persuaded by the Service's appellate argument, which rests largely on the law stemming from cases where the alien was charged with a firearms offense. *See Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995); *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992); *see also Cato v. INS*, 84 F.3d 597 (2d Cir. 1996).

Turning to the respondent's claim that he should have been granted a waiver pursuant to section 212(c), we find that the Immigration Judge considered the relevant equities and adverse factors of record. The Immigration Judge applied the well-established standards for exercising discretion. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *see also Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991); *Matter of Edwards*, 201 I&N Dec. 191 (BIA 1990). Following a full and detailed analysis, the Immigration Judge reasonably concluded that the equities do not outweigh the adverse factors (I.J. at 13-28). The Immigration Judge noted that the respondent has very significant equities, including a long period of residence in the United Stales and extensive family ties. However, the Immigration Judge concluded that the nature of the respondent's offense (robbery in the second degree) under circumstances involving a firearm and a car chase through New York City, and combined with unclear evidence of rehabilitation, outweighed the positive factors. We find insufficient basis for concluding otherwise.

Therefore, we will affirm the Immigration Judge's discretionary denial. Accordingly, we will enter the following orders.

ORDER: The appeal, filed by the Service, is dismissed.

FURTHER ORDER: The respondent's appeal is dismissed.

/s/ [illegible]
FOR THE BOARD

APPENDIX M

U.S. Department of Justice

Decision of the Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A38-139-424-NEW YORK Date: [STAMP: MAY 27 2004]

In re: *S-LEI, GUANG SHEN**

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bretz, Kerry W., Esquire

ON BEHALF OF DHS: Paul Halligan

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). The Department of Homeland Security ("DHS"), formerly the Immigration and Naturalization Service, has appealed the Immigration Judge's decision to grant the respondent's application for a waiver of inadmissibility under section 212(c) of the immigration and Nationality Act.

The DHS notes that there is no comparable ground of inadmissibility available to one convicted of an ag-

gravated felony, and that the respondent is therefore precluded form [sic] applying for that relief. We held in *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991), that a waiver under section 212(c) is not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, "convicted of an aggravated felony." *Id.* at 259. The Board concluded in that case that, because the respondent was found to have been convicted of an aggravated felony based on a conviction for a drug trafficking crime, and because the respondent would have been inadmissible under section 212(a)(23) based on that crime, he was not precluded from establishing eligibility for section 212(c) relief.

In this case, the respondent was convicted of second degree attempted robbery, which presently could be considered an aggravated felony as either a crime of violence or a theft crime. *See* section 101(a)(43)(F) and (G) of the Act (Act), 8 U.S.C. § 1101(a)(43)(F) and (G). However, at the time of the respondent's conviction on September 11, 1995, he could have been charged with inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, as amended, as one convicted of a crime involving moral turpitude. Accordingly, he would not be not precluded from establishing eligibility for section 212(c) relief. We further find no error in the Immigration Judge's decision to grant the waiver to the respondent in the exercise of discretion. Accordingly, the appeal is dismissed.

/s/ Anthony C. [illegible]
FOR THE BOARD

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAR 2 2 2010
OFFICE OF THE CLERK

(2)

No. 09-594

In the Supreme Court of the United States

JOSE ERASMO DE LA ROSA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the denial of relief from removal under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), violates the equal protection component of the Due Process Clause, when an alien who is removable because he committed a specific aggravated felony is not being treated differently from other aliens who are similarly removable on grounds that have no statutory counterpart in the INA's grounds for inadmissibility.

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In the Supreme Court of the United States

No. 09-594

JOSE ERASMO DE LA ROSA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 579 F.3d 1327. The opinions of the Board of Immigration Appeals (Pet. App. 29a-31a) and the immigration judge (Pet. App. 33a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2009. The petition for a writ of certiorari was filed on November 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to

apply for discretionary relief from exclusion. By its terms, Section 212(c) applied only to certain aliens in exclusion proceedings (*i.e.*, proceedings in which aliens were seeking to "be admitted" to the United States after "temporarily proceed[ing] abroad voluntarily"). In 1976, however, the Second Circuit determined that making that discretionary relief available to aliens who had departed the United States while denying it to aliens who remained in the United States violated equal protection. *Francis* v. *INS*, 532 F.2d 268, 273. The Board of Immigration Appeals (Board) adopted that rationale on a nationwide basis in *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976), so that Section 212(c) was generally construed as being available in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In applying the principle of treating those in deportation proceedings like those in exclusion proceedings, the Board has long maintained that an alien in deportation proceedings can obtain Section 212(c) relief only if the ground for his deportation has a comparable ground among the statutory grounds of exclusion. See, *e.g.*, *In re Wadud*, 19 I. & N. Dec. 182 (B.I.A. 1984); *In re Granados*, 16 I. & N. Dec. 726 (B.I.A. 1979). That practice is known as the "comparable ground" or "statutory counterpart" test, and it has been codified by regulation at 8 C.F.R. 1212.3(f)(5).[1]

In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110

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[1] In pertinent part, 8 C.F.R. 1212.3(f) states:

> An application for relief under former section 212(c) of the Act shall be denied if: * * * (5) The alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

Stat. 1277, Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including aggravated felonies. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety. IIRIRA also did away with the distinction between "deportation" and "exclusion" proceedings, designating them both as "removal" proceedings. See §§ 303-306, 110 Stat. 3009-585; Pet. App. 2a n.2.

In *INS* v. *St. Cyr*, *supra*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony on the basis of a plea agreement that the alien made at a time when the alien would still have been eligible for Section 212(c) relief in spite of the resulting conviction. 533 U.S. at 314-326. Although some aliens necessarily benefitted from the conclusion that Section 212(c)'s repeal was not retroactively applicable, the Court did not suggest that aliens would not still be subject to any pre-existing limitations on their eligibility for relief under Section 212(c), including the "statutory counterpart" test.

As relevant to the circumstances of this case, the operation of that test was further clarified by the Board in *In re Blake*, 23 I. & N. Dec. 722 (2005), remanded, 489 F.3d 88 (2d Cir. 2007), and *In re Brieva-Perez*, 23 I. & N. Dec. 766 (2005), petition for review denied, 482 F.3d 356 (5th Cir. 2007). Those cases held that a statutory ground of exclusion is only a "comparable ground[]" to the charged ground of deportation if the two grounds use similar language to describe "substantially equivalent categories of offenses." *Brieva-Perez*, 23 I. & N.

Dec. at 771; *In re Blake*, 23 I. & N. Dec. at 728. In *In re Blake*, the Board held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal of having an aggravated felony conviction for sexual abuse of a minor. *Id.* at 729. In *Brieva-Perez*, the Board similarly held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal of having an aggravated felony conviction for a crime of violence. 23 I. & N. Dec. at 773. Well before the Board published those precedential decisions, however, the analytical underpinnings of its interpretation had been confirmed by, among others, the Ninth Circuit's decision in *Komarenko* v. *INS*, 35 F.3d 432 (1994).

In 2007, the Second Circuit disagreed with *Komarenko* and the "several other circuits" that had followed it. *Blake* v. *Carbone*, 489 F.3d 88, 103-104. The Second Circuit recognized that the statutory-counterpart test codified in 8 C.F.R. 1212.3(f)(5) did "nothing more than crystallize the agency's preexisting body of law and therefore [could not] have an impermissible retroactive effect"; but the Second Circuit held that, when analyzed on the basis of a "particular criminal offense[]," the ground of inadmissibility for a "crime involving moral turpitude" was sufficiently comparable to an aggravated felony of sexual abuse of a minor to permit relief under former Section 212(c). *Blake*, 489 F.3d at 98-99, 101, 103.

2. Petitioner is a native and citizen of the Dominican Republic who was admitted in lawful permanent resident status in 1989. Pet. App. 3a, 29a. In 1995, petitioner pleaded *nolo contendere* to the offense of committing a lewd act upon a child under the age of sixteen, in violation of Florida law. *Id.* at 3a. Based on that convic-

tion, petitioner was placed in removal proceedings in 2004, and on March 16, 2007, an immigration judge ruled that petitioner was subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) as an alien who has been convicted of an aggravated felony (specifically, "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A)), and under 8 U.S.C. 1227(a)(2)(E)(i), as an alien who has been convicted of a crime of child abuse. Pet. App. 3a, 29a-30a, 34a. The immigration judge denied petitioner's application for relief under former Section 212(c), finding that there was no ground of inadmissibility that was sufficiently comparable to the aggravated-felony ground of removal, and ordered him removed to the Dominican Republic. *Id.* at 35a-36a.

On June 10, 2008, the Board dismissed petitioner's appeal. It agreed with the immigration judge that, pursuant to the Board's reasoning in *In re Blake*, petitioner was statutorily ineligible for relief under former Section 212(c), because the charge of deportability on the basis of a conviction for sexual abuse of a minor has no statutory counterpart among the grounds of inadmissibility. Pet. App. 29a-31a. The Board rejected the application of the Second Circuit's reasoning in *Blake* v. *Carbone*, observing that three other circuits had accepted the Board's holding in *In re Blake*. *Id.* at 30a-31a. The Board also observed that the Eleventh Circuit—the court of appeals with jurisdiction over this case—had "expressly ratified" "the rationale underlying [*In re*] *Blake*." *Id.* at 31a (citing *Farquharson* v. *United States Att'y Gen.*, 246 F.3d 1317, 1324-1325 (11th Cir. 2001), and *Rodriguez-Padron* v. *INS*, 13 F.3d 1455, 1458-1460 (11th Cir. 1994)).

3. Petitioner sought judicial review of the Board's decision, and the Eleventh Circuit denied his petition for

review. Pet. App. 1a-28a. Joining the First, Third, Fifth, Sixth, Seventh, and Eighth Circuits, the court accepted the Board's decision in *In re Blake* and rejected the Second Circuit's contrary ruling in *Blake* v. *Carbone*. *Id.* at 13a-14a, 17a & n.11. The court also noted that the Ninth Circuit, in *Abebe* v. *Mukasey*, 554 F.3d 1203, 1206-1207 (2009) (en banc), petition for cert. pending, No. 09-600 (filed Nov. 16, 2009), had adopted a different approach that repudiated the equal protection reasoning of the Second Circuit in *Francis* v. *INS*, *supra*, upon which *Blake* v. *Carbone* was based, and that would also foreclose relief to aliens like petitioner. Pet. App. 16a-18a.

At the outset, the court of appeals disagreed with petitioner's interpretation of Board and circuit court precedent prior to *Blake*, observing that statutory-counterpart analysis had long been the law, and that, as early as 1984, the Board had rejected eligibility for a waiver under Section 212(c) when the underlying offense, but not the ground for removal, was a crime involving moral turpitude. Pet. App. 19a (citing cases). The court concluded that the Board's "focus" in *In re Blake* "on the charged grounds of deportation instead of the underlying offense did not represent a departure from prior [Board] practice." *Ibid.*

Although petitioner did not directly challenge the Board's statutory-counterpart rule on equal-protection grounds, the court of appeals addressed and rejected what it considered to be the "implicit [equal-protection] argument underpinning his position." Pet. App. 22a. The court rejected the Second Circuit's "more expansive view of equal protection" in *Blake* v. *Carbone*, explaining that it felt "bound by the canons of deference and judicial restraint to respect the law's contemporary termi-

nus," and reiterating its "aversion to 'stretch[ing] [§ 212(c)] beyond its language.'" *Id.* at 22a-23a (brackets in original) (quoting *Farquharson*, 246 F.3d at 1325); see also *id.* at 27a ("We * * * hew to the maxim that courts are charged with adjudication, not legislation.").

The court of appeals specifically stressed that it adhered to the equal-protection reasoning in *Francis*,[2] and —applying logic articulated by the Third, Seventh, and Ninth Circuits—distinguished it from the offense-based approach that the Second Circuit later adopted in *Blake* v. *Carbone*, *supra*. Pet. App. 23a-27a. As the court of appeals explained, unless a ground for exclusion and a ground of deportation are counterparts, "a deportable alien usually is not similarly situated to an excludable alien * * * because Congress delineated different grounds for deportation and exclusion." *Id.* at 24a. Moreover, relief from removal under Section 212(c) refers only to the identity of the statutory ground of removal, not to the underlying crime. *Id.* at 25a-26a. "[T]he underlying crime for which [the petitioner] was convicted plays no role in this inquiry. It is therefore irrelevant that [his] conviction . . . *could* have subjected him to removal as an alien convicted of a crime of moral turpitude under INA § 237(a)(2)(A)(i)." *Id.* at 26a (quoting *Caroleo* v. *Gonzales*, 476 F.3d 158, 168 (3d Cir. 2007)) (brackets in original).

The court of appeals concluded that, "if courts were to look beyond the charged grounds of deportation to the underlying criminal offense to determine whether the criminal offense could have been treated as a crime of moral turpitude, that would greatly expand the role

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[2] The panel noted that the circuit's long-standing endorsement of *Francis* prevented the panel from considering the Ninth Circuit's approach in *Abebe*. Pet. App. 22a n.14.

Congress assigned the judiciary in immigration cases." Pet. App. 26a-27a (quoting *Zamora-Mallari* v. *Mukasey*, 514 F.3d 679, 692 (7th Cir. 2008)). "An alien is no more entitled to section 212(c) relief when charged with a ground of removal that has no statutory counterpart under the INA's inadmissibility provisions than a defendant is entitled to a sentencing range consistent with the least serious crime with which he could have been charged." *Id.* at 27a (quoting *Abebe*, 554 F.3d at 1212 (Clifton, J., concurring)). Therefore, because there is no ground of inadmissibility for sexual abuse of a minor, the panel held that relief under former Section 212(c) is available only to those aliens charged as deportable on a ground that is comparable to a ground of exclusion. *Id.* at 28a.

ARGUMENT

The decision of the court of appeals is correct. The issue concerns a statutory section repealed more than 13 years ago, and that therefore is of greatly diminished importance. Moreover, every court of appeals to have addressed the question (except the Second Circuit) would deny petitioner relief. This court has recently denied certiorari in two cases presenting a similar question. See *Birkett* v. *Holder*, 129 S. Ct. 2043 (2009) (No. 08-6816); *Gonzalez-Mesias* v. *Holder*, 129 S. Ct. 2042 (2009) (No. 08-605). Further review is similarly unwarranted in this case.

1. As petitioner acknowledges (Pet. 15), the First, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have concluded in published opinions that the Board's application of the statutory-counterpart test constitutes a permissible interpretation of former Section 212(c) and does not violate equal protection. See,

e.g., *Kim* v. *Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 162-163 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 371-372 (5th Cir. 2007); *Koussan* v. *Holder*, 556 F.3d 403, 412-414 (6th Cir. 2009); *Zamora-Mallari* v. *Mukasey*, 514 F.3d 679, 691-692 (7th Cir. 2008); *Vue* v. *Gonzales*, 496 F.3d 858, 860-862 (8th Cir. 2007); Pet. App. 23a-28a (11th Cir. 2009).[3]

In addition, the Ninth Circuit's en banc decision in *Abebe* v. *Mukasey*, 554 F.3d 1203, 1206-1207 (2009), petition for cert. pending, No. 09-600 (filed Nov. 16, 2009), essentially comports with those circuits with regard to the statutory-counterpart rule. Although *Abebe* disagreed with the proposition that there is any constitutional basis for applying former Section 212(c) to aliens in deportation (as opposed to exclusion) proceedings, it left in place the regulation implementing the statutory-counterpart test, which means that the Board's reasoning in *In re Blake*, 23 I & N. Dec. 722 (2005), still applies in the Ninth Circuit. See *Abebe*, 554 F.3d at 1207 (stating that the decision does not "cast[] any doubt on the regulation" that codified the Board's statutory-counterpart rule); see also *Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706 (9th Cir. 2010) (applying 8 C.F.R. 1212.3(f)(5) and finding alien ineligible for Section 212(c) relief because the grounds for his removal did not have statutory counterparts among the grounds of inadmissibility); *In re Moreno-Escobosa*, 25 I. & N. Dec. 114, 117 (B.I.A. 2009) ("[T]he Ninth Circuit's decision in *Abebe* v. *Mukasey* can be fairly read as rejecting the equal pro-

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[3] As petitioner notes (Pet. 15 n.9), the Tenth Circuit has applied the statutory-counterpart rule in an unpublished decision. *Alvarez* v. *Mukasey*, 282 Fed. Appx. 718, 723 (2008).

tection challenge to the application of the statutory counterpart rule.").

Thus, despite petitioner's (and the court of appeals') references to a three-way division in the circuits (Pet. 2, 15, 18; Pet. App. 17a), there is no effective difference —in terms of sustaining the Board's application of the statutory-counterpart rule—between the Ninth Circuit's decision and the decisions of the seven other circuits that have agreed with the reasoning of the Board's decision in *In re Blake*. The only court of appeals to have reached a different result is the Second Circuit, in *Blake* v. *Carbone*, 489 F.3d 88, 103-104 (2007).[4]

2. Contrary to petitioner's contention (Pet. 21-30), the statutory-counterpart rule applied by the Board does not violate the equal protection component of the Fifth Amendment's Due Process Clause.

Petitioner argues (Pet. 22) that the Board's decision in *In re Blake* "creates an irrational distinction between [lawful permanent residents] who have traveled abroad and [those] who have not, contrary to Section 212(c) as it has consistently been interpreted and contrary to equal protection." Petitioner thus essentially contends as follows: If he had left the United States and attempted to return, his conviction for committing a lewd act upon a child could have subjected him to removal based on a charge of inadmissibility for having committed "a crime involving moral turpitude" under Section

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[4] Presumably because of the underlying consistency between the result of the Ninth Circuit's decision and that in all other Circuits (except the Second), the petition for a writ of certiorari in *Abebe* recognizes that the disposition of this case—which the petition in *Abebe* characterizes as having "more fully developed" issues—would "affect the outcome" of *Abebe*. See Pet. at 30, *Abebe* v. *Holder*, petition for cert. pending, No. 09-600 (filed Nov. 16, 2009).

212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), and that would have made him eligible for Section 212(c) relief. Petitioner contends that it is irrational for him to be ineligible for Section 212(c) relief because he remained within the United States and thus be subject to removal based on the charge of having committed the aggravated felony of sexual abuse of a minor—a ground that the Board holds is not comparable to the inadmissibility ground of having committed a crime involving moral turpitude. This argument is without merit.

a. As an initial matter, petitioner errs in contending that:

> Before 2005, the [Board] consistently held that [a lawful permanent resident] deportable on the basis of an aggravated felony conviction for "sexual abuse of a minor" or a "crime of violence" was eligible for Section 212(c) relief from removal if the underlying conviction would have been a basis for inadmissibility (*e.g.*, as a "crime involving moral turpitude" under [8 U.S.C. 1182(a)(2)(A)(i)]).

Pet. 21 (citing Pet. 11-12 nn.6-7). In fact, of the thirteen decisions of the Board that petitioner cites (Pet. 11-12 nn.6-7), only two were precedential. The first of those, *In re Rodriguez-Cortes*, 20 I. & N. Dec. 587 (B.I.A. 1992), addressed only the issue of whether a sentence-enhancement provision (which permitted the imprisonment served to exceed the five years then required to bar relief under Section 212(c)) necessarily caused a conviction to constitute one involving a firearm. *Id.* at 590. The second decision, *In re A–A–*, 20 I. & N. Dec. 492 (B.I.A. 1992), held that the alien had been convicted of an aggravated felony and served the term of imprisonment that barred him from Section 212(c) relief. *Id.*

at 500-503. In each case, the underlying conviction was for murder, but neither Board decision specifically addressed or held, as petitioner suggests, that a crime involving moral turpitude under 8 U.S.C. 1182(a)(2)(A)(i) is a ground of inadmissibility comparable to murder. Petitioner thus cites no precedential Board decision holding that an alien who has been convicted of a crime rendering him deportable as an aggravated felon on the ground of "sexual abuse of a minor" or a "crime of violence" is categorically eligible for Section 212(c) relief if his particular crime could have served as a basis for inadmissibility. Moreover, to the extent that the nonprecedential decisions cited by petitioner are based on *In re Meza*, 20 I. & N. Dec. 257 (B.I.A. 1991), the Board affirmatively distinguished that decision in *In re Blake*, which is the only precedential decision to have specifically addressed sexual abuse of a minor. See 23 I. & N. Dec. at 724-728.

b. As this Court has repeatedly stated: "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Thus, whether an immigration provision is constitutional depends only on the existence of a "facially legitimate and bona fide reason" for its enactment. *Id.* at 794 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1992)).

As a general matter, Congress has determined that the statutory regime that applies to an alien who has already been admitted to the country is different from the one that applies to an alien who is seeking admission. Compare 8 U.S.C. 1182, with 8 U.S.C. 1227. It is thus unsurprising that the categories of offenses that make

an alien inadmissible are not always the same as those that may render an alien deportable from the country. That fundamental legislative choice shows that aliens who are inadmissible are not similarly situated with aliens subject to removal on grounds of being deportable, even though there is some overlap between the conduct that renders an alien inadmissible and the conduct that renders an alien deportable. It is only where a ground that renders an alien deportable under the one regime has a statutory counterpart that renders an alien inadmissible under the other regime that the two aliens could be said to be similarly situated for equal protection purposes (and thus warrant the application of former Section 212(c) to the category of aliens to whom it did not, by its own terms, apply).

The reasoning employed in *Komarenko* v. *INS*, 35 F.3d 432 (9th Cir. 1994), which was quoted by the court of appeals below (Pet. App. 24a-25a) and has also been endorsed by most of the other courts of appeals, is persuasive. In *Komarenko*, the court rejected a similar equal protection claim in finding that two groups of aliens convicted of different crimes were not similarly situated for purposes of eligibility for Section 212(c) relief. *Id.* at 435. The court concluded that the "linchpin of the equal protection analysis in this context is that the two provisions be 'substantially identical.'" *Ibid.*; see also *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 952 (7th Cir. 1993). Komarenko claimed the court was required to "focus on the facts of his individual case and conclude that because he *could have been* excluded under the moral turpitude provision, he has been denied equal protection." *Komarenko*, 35 F.3d at 435. The court, however, refused "to speculate whether the I.N.S. would have applied this broad excludability provision to an

alien in Komarenko's position," because engaging in such speculation "would extend discretionary review to every ground for deportation that could constitute 'the essential elements of a crime involving moral turpitude.'" *Ibid.* Such an approach would be tantamount to "judicial legislating," would "vastly overstep" the courts' "limited scope of judicial inquiry into immigration legislation," and "would interfere with the broad enforcement powers Congress has delegated to the Attorney General." *Ibid.* (quoting *Fiallo*, 430 U.S. at 792). Accordingly, the court "decline[d] to adopt a factual approach to * * * equal protection analysis in the context of the deportation and excludability provisions of the INA," and it "conclude[d] that Komarenko was not denied his constitutional right to equal protection of the law." *Ibid.*

Thus, under the rational-basis standard of review, Congress may draw lines on the basis of general categories without regard to the circumstances of a particular individual. See, *e.g.*, *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). It is only when the statutory ground for a deportable alien's removal from the country has a statutory counterpart in the grounds for inadmissibility that a deportable alien is arguably similarly situated to inadmissible aliens. See *Komarenko*, 35 F.3d at 435. As the Seventh Circuit has explained:

> [C]ertain deportable aliens may receive exclusion-type relief as if they were subject to exclusion rather than deportation. But that fiction requires that the aliens be excludable *for the same reasons* that render them deportable—a situation not necessarily true for all aliens facing deportations. Accordingly, [S]ection 212(c) relief was not extended to aliens whose

> deportability was based on a ground for which a comparable ground of exclusion did not exist.

Leal-Rodriguez, 990 F.2d at 949 (emphasis added). The court in *Leal-Rodriguez* held that an alien who was deportable for entering the United States without inspection was not eligible for Section 212(c) relief because there was no corresponding ground of inadmissibility to the deportation charge. *Id.* at 948, 950.

In this case, petitioner's argument similarly fails because his ground of deportation (for having been convicted of the aggravated felony of sexual abuse of a minor) is not "substantially equivalent" or "substantially identical" to a ground of inadmissibility under Section 212(a) of the INA. *Komarenko*, 35 F.3d at 435. As the Board correctly reasoned in *In re Blake*, sexual abuse of a minor under 8 U.S.C. 1101(a)(43)(A) lacks a statutory counterpart among the grounds of inadmissibility in Section 212(a). Although sexual abuse of a minor may constitute "a crime involving moral turpitude" under Section 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), the latter category addresses a distinctly different and much broader category of offenses than a charge for an aggravated felony of sexual abuse of a minor. Thus, while the statutory-counterpart test does not require a perfect match, the ground of inadmissibility must address essentially the same category of offense on which the removal charge is based.

Under the pertinent regulations and the Board's decisions, that test is not met merely by showing that some (or even many) of the aliens whose offenses are included in a given category could also have their crimes characterized as ones involving moral turpitude. See, *e.g.*, *Zamora-Mallari*, 514 F.3d at 693 (holding that the aggravated felony of sexual abuse of a minor has no statu-

tory counterpart); *Avilez-Granados* v. *Gonzales*, 481 F.3d 869, 871-872 (5th Cir. 2007) (same). That analysis is firmly supported by the unanimous opinions of the courts of appeals holding that a firearms offense (which is a ground of removability under 8 U.S.C. 1227(a)(2)(C)) has no statutory counterpart under Section 212(a), even though "many firearms offenses may also be crimes of moral turpitude."[5] *In re Blake*, 23 I. & N. Dec. at 728.

Thus, because petitioner is not similarly situated to an inadmissible alien who has been convicted of a crime involving moral turpitude, and because he is not being treated any differently from other aliens who are deportable upon grounds that themselves have no corresponding ground of inadmissibility, his equal protection claim is meritless.[6]

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[5] For the same reason, petitioner's contention (Pet. 28) that the Board erroneously interpreted 8 C.F.R. 1212.3(f)(5) so as to "confine" this Court's decision in *St. Cyr*, rather than "implement" it, fails. Petitioner argues that the Board, in *In re Blake*, impermissibly interpreted 8 C.F.R. 1212.3(f)(5) inconsistently with its "prior rulings that [a lawful permanent resident alien] deportable for an aggravated felony was eligible for Section 212(c) relief if the conviction would also fall under a counterpart inadmissibility provision." Pet. 29 (emphasis omitted). But petitioner's characterization of the Board's prior practice is flawed, because it overlooks the fact that the Board has always considered whether the charged ground of deportability compared with any ground of inadmissibility, and not whether the alien's crime could have formed the basis for a different charge of inadmissibility. See *In re Blake*, 23 I. & N. Dec. at 728. As a result, petitioner's assertions (Pet. 30) about "retroactive application" of 8 C.F.R. 1212.3(f)(5) are unfounded.

[6] Petitioner contends (Pet. 28 & n.17) that the relevant comparison should be between deportable aliens who have left the country and those who have not, because a deportable alien who left the country could be treated as if he had been put into proceedings upon reentry such that relief was available *nunc pro tunc*. But, other than *Blake* v. *Carbone*, the authority he offers is *In re I—*, 1 I. & N. Dec. 1 (B.I.A.

3. Although the Second Circuit has reached a different result, this case does not present a question of sufficient importance to warrant this Court's review. The Second Circuit is an outlier: eight other circuits, including the Eleventh Circuit below, have approved the Board's approach in *In re Blake*. And this Court denied certiorari twice last year, well after the Second Circuit had issued its decision in *Blake* v. *Carbone*. See *Birkett*, *supra*; *Gonzalez-Mesias*, *supra*. Moreover, petitioner's question concerns an alien's eligibility for a form of discretionary relief under a statute that was repealed more than 13 years ago and is only potentially applicable to him on the theory that he might have relied on being eligible for it had his removal proceedings been initiated before the 1996 enactments. See *INS* v. *St. Cyr*, 533 U.S. 289, 325 (2001). But as the court of appeals observed below, the statutory-counterpart test to which petitioner objects is not new—indeed, it long predates the repeal of Section 212(c) in 1996 (see p. 2, *supra*; Pet.

1940), which addressed "the power to retroactively grant the Attorney General's discretion to permit an alien to reapply for admission after being deported and subsequently reentering the country." *Ramirez-Canales* v. *Mukasey*, 517 F.3d 904, 910 (6th Cir. 2008). The cases in which the Board has applied Section 212(c) or its predecessor provisions make clear that, although "[i]t has long been the administrative practice to exercise the discretion permitted by the foregoing provisions of law, *nunc pro tunc*," the Board does so only "where complete justice to an alien dictates such extraordinary action." *In re T–*, 6 I. & N. Dec. 410, 413 (B.I.A. 1954). Thus, while "the equitable power to grant orders *nunc pro tunc* is conceptually broad," *Ramirez-Canales*, 517 F.3d at 910, its application is wholly discretionary and it is limited to extraordinary cases—not every case where an alien is otherwise eligible for relief. For the same reasons that petitioner is not similarly situated to an alien who departed and is seeking to re-enter, complete justice would not mandate the application of *nunc pro tunc* discretion.

App. 7a-11a; *Blake*, 489 F.3d at 98-99)—and petitioner could have easily avoided its effects by departing the country voluntarily at any point before his removal proceedings were initiated in 2004. Cf. *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 (2006) ("It is therefore the alien's choice to continue his illegal presence * * * that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.").

In contending that his case presents an issue of exceptional importance, petitioner cites a statistic about 10,000 grants of Section 212(c) relief between 1989 and 1995. Pet. 31 (quoting *St. Cyr*, 533 U.S. at 296). That figure is of little relevance here not only because of its age but also because Section 212(c) was still in effect between 1989 and 1995. In recent years, the number of grants of relief under former Section 212(c) has been smaller and declining. It went from 1905 grants in FY 2004 to 858 grants in FY 2009—a 55% decline. See Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf; Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2009 Statistical Year Book* Table 15, at R3 (2010), http://www.justice.gov/eoir/statspub/fy09syb.pdf. Over that same period, the number of applications for relief under former Section 212(c) fell even more dramatically. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2009, there were 576. That reflects a 78% decline since FY 2004—and a 55% decline since FY 2008.[7]

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[7] These figures, which are based on both published and unpublished statistics compiled by the Executive Office of Immigration Review,

Of course, the number of aliens who could be affected by the outcome of this case will necessarily be even smaller, since an alien would not become eligible for discretionary relief under petitioner's theory unless he or she met, at a minimum, each of the following criteria: (1) lawful-permanent-resident status; (2) a conviction predating the repeal of Section 212(c) that (3) resulted from a plea of guilty or no contest (rather than a trial);[8] and (4) a removal charge that has no comparable ground of inadmissibility except when considered on the basis of the facts of the underlying offense. Given the limited nature of that class, petitioner's assertion (Pet. 30) that the case presents an issue of "[e]xceptional [a]nd [c]ontinuing [i]mportance" fails.

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were also cited in the government's briefs opposing certiorari in *Ferguson* v. *Holder*, cert. denied, No. 09-263 (Mar. 8, 2010), and *Molina-De La Villa* v. *Holder*, cert. denied, No. 09-640 (Mar. 22, 2010). In *Molina-De La Villa*, the petitioner's reply brief (at 6) noted that previous editions of the *Statistical Year Book* had reported lower numbers of 212(c) grants for some years. The higher figures in the more recent editions of the *Statistical Year Book* reflected a database conversion that more accurately captured the number of aliens with requests for relief under former Section 212(c).

[8] In some circuits, *St. Cyr* has been applied to allow some aliens who were convicted after a trial to be eligible for relief under former Section 212(c). The Court most recently denied certiorari on that question in *Ferguson*, *supra*, and *Molina-De La Villa*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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No. 09-594

IN THE

Supreme Court of the United States

JOSE ERASMO DE LA ROSA,
Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government does not dispute that the question presented has split the circuits, has been fully aired, and is critically significant to hundreds of lawful permanent residents (LPRs). It instead contends primarily that the decision below was correct. Opp. 8. That is wrong, but in any event is not a reason to deny review given the irreconcilable circuit split on an important and recurring question of federal law.

ARGUMENT

1. Petitioner indisputably would have been eligible for Section 212(c) relief had his case originated in the Second Circuit. The government disparages that

court as an "outlier" (Opp. 17)—a term hardly befitting the circuit that hears over one-quarter of all immigration cases and more than the *combined* total of cases from circuits agreeing with the government's position. Pet. 20 n.13. And the government does not defend the extreme reasoning of the Ninth Circuit, contending instead (Opp. 9) that the Ninth Circuit's position "essentially comports" with that of other circuits—a revisionist interpretation rejected by the courts involved. *E.g.*, Pet. App. 22a n.14 (Eleventh Circuit's refusal to follow "the route taken by the Ninth Circuit"); *Abebe* v. *Mukasey*, 554 F.3d 1203, 1211 (9th Cir. 2009) (en banc) (Clifton, J., concurring) (Ninth Circuit majority "create[d] a three-way circuit split"), *petition for cert. filed sub nom. Abebe* v. *Holder*, 78 U.S.L.W. 3322 (U.S. Nov. 16, 2009) (No. 09-600). Ultimately, it does not matter whether the circuits are split two ways or three; what matters is that cases are decided differently depending on their venue.[1]

The government does not dispute that the question presented has arisen in over 120 circuit and BIA cases since 2005 (Pet. App. 45a-52a)—a figure that does not include unreported decisions of immigration judges. Nor does a decline in Section 212(c) grants between 2004 and 2009 (Opp. 18) help the government, because that decline coincides with the BIA's 2005 decision in *Matter of Blake*, 23 I. & N. Dec. 722, *rev'd*, 489 F.3d 88 (2d Cir. 2007). It is hardly surprising that Section

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[1] Some LPRs are moved from the Second Circuit to detention in other circuits, which can doom meritorious Section 212(c) claims. *E.g.*, *Matter of Ramcharran*, 2008 WL 4420107 (BIA Sept. 23, 2008) (Section 212(c) claim denied after LPR living in New York was transferred to detention in Texas).

212(c) grants dropped immediately after the BIA's unexpected "change in law," which eliminated Section 212(c) relief for hundreds of LPRs who previously were eligible for it. *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb. 22, 2008); Pet. 11-15 & nn.6-7.

The government's claim that Section 212(c) *applications* have decreased since 2004—a claim supposedly based on unidentified "published and unpublished statistics" (Opp. 18 & n.7)—is similarly unavailing. LPRs in circuits governed by *Blake* are less likely to apply for Section 212(c) relief or to be informed by counsel or an immigration judge that they may do so. Moreover, because the government has not revealed the methodology underlying its "unpublished statistics," it is unclear whether they include cases in which the government moves to "pretermit" Section 212(c) relief. *E.g.*, Pet. App. 3a. And even the government admits that 858 LPRs were granted Section 212(c) relief in 2009. Opp. 18. A form of relief that allows over 800 people to avoid removal each year is far from unimportant.

Nor does Section 212(c)'s prospective repeal in 1996 reduce its importance as a present-day avenue for relief. For many LPRs who have lived here lawfully for decades, the issue only arises when they apply for naturalization, as Petitioner did, and the government then tries to deport them. *E.g.*, *Lovan* v. *Holder*, 574 F.3d 990, 992 (8th Cir. 2009). Section 212(c) thus still affects hundreds if not thousands of people—far more than those likely affected by the statute at issue in *Flores-Villar* v. *United States*, 536 F.3d 990 (9th Cir. 2008), *cert. granted*, 78 U.S.L.W. 3546 (U.S. Mar. 22, 2010) (No. 09-5801), which involves a provision amended in 1986 in a way that substantially reduced its scope. Cert. Opp. 17, *Flores-Villar*.

The government observes that this Court denied two similar petitions last year. But as the government pointed out at the time, the circuits had not fully aired the issue. Cert. Opp. 9, *Gonzalez-Mesias* v. *Holder*, No. 08-605 (U.S. Mar. 9, 2009) (issue had not "fully percolated" (quotation marks omitted)); Cert. Opp. 13, *Birkett* v. *Holder*, No. 08-6816 (U.S. Mar. 9, 2009) (review would be "premature"). The government makes no such argument now. Moreover, the prior petitions did not identify the BIA's consistent practice of *granting* Section 212(c) relief to deportable LPRs in Petitioner's position or the frequency with which this issue arises. Pet. 11-12; Pet. App. 45a-52a.

The BIA has essentially undone this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), repealing Section 212(c) for any LPR outside the Second Circuit who is deportable for a non-drug aggravated felony—unless the LPR fortuitously left the United States and returned. That erroneous constriction of Section 212(c) implicates undeniably powerful interests: deportation "may result ... in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922); *see also Padilla* v. *Kentucky*, 2010 WL 1222274, at *11 (U.S. Mar. 31, 2010) (describing "[t]he severity of deportation" as "the equivalent of banishment or exile" (quotation marks omitted)). Petitioner, whom an immigration judge found was "rehabilitated" (Pet. App. 39a), has been separated from his work, his property, and his U.S. citizen children and other family members since October 2008. These circumstances warrant this Court's review.

2. The government's merits arguments depend on distorting both Section 212(c)'s history and Petitioner's position.

a. The government argues that the BIA's sudden about-face in 2005 was not retroactive. Opp. 16 n.5; *accord* Opp. 11. Yet the government identifies no pre-2005 case—not one—holding that an LPR who was deportable for a "crime of violence" or "sexual abuse of a minor" offense was ineligible for Section 212(c) relief. Petitioner, by contrast, identified several contrary examples, including cases in which relief was granted but then withdrawn after *Blake* changed the law. Pet. 11-12 nn.6-7, 15.

The government cavils that BIA decisions granting relief were not "precedential" (Opp. 11-12), without explaining why that should matter. Consistent uniform decisions, published or not, indicate agency practice. *See Cruz* v. *Attorney General*, 452 F.3d 240, 246 & n.3 (3d Cir. 2006) (noting "routine[]" BIA practice based on "ten unpublished opinions" with no contrary decision). If anything, non-publication suggests that the decisions were uncontroversial and did not involve the "alteration, modification, or clarification of an existing rule of law." BIA Practice Manual § 1.4(d)(i)(A). The "unbroken string of unpublished opinions" also "underline[s] the correctness" of similar reasoning in published decisions. *Perez-Enriquez* v. *Gonzales*, 463 F.3d 1007, 1013 (9th Cir. 2006) (en banc).[2]

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[2] In 1992, the BIA held that an LPR convicted of attempted murder (a crime of violence) could apply for Section 212(c) relief, distinguishing firearms cases in which the LPR lacked "a comparable ground of excludability." *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 589-590. The BIA's remand "to afford the [LPR] an opportunity to apply for a [Section 212(c)] waiver" (*id.* at 591) would have been futile if all crimes of violence lacked statutory counterparts. That same year, the BIA found that an LPR convicted of murder was "deportable under a deportation provision

The BIA's approach before 2005 mirrors contemporaneous court of appeals decisions, none of which the government addresses. Pet. 10, 12-13. Even the government itself, when opposing Section 212(c) relief for an LPR convicted of a crime of violence, did not argue that relief was unavailable due to lack of a statutory counterpart. Appellees' Br. 11-12, *Cordes* v. *Gonzales*, No. 04-15988 (9th Cir. Oct. 12, 2004). Such an argument, were it correct, would have easily resolved the case in the government's favor; instead, the LPR prevailed. *Cordes* v. *Gonzales*, 421 F.3d 889, 893, 898-899 (9th Cir. 2005), *vacated on other grounds sub nom. Cordes* v. *Mukasey*, 517 F.3d 1094 (9th Cir. 2008). And the government argued in 2002 that "Congress could rationally have decided to eliminate [Section 212(c)] relief altogether for all aliens convicted of ... crimes of violence"—a contention that only made sense because LPRs with "crime of violence" convictions *were* eligible for relief. Appellee's Br. *13, *United States* v. *Ubaldo-Figueroa*, 2002 WL 32254035 (9th Cir. Oct. 10, 2002). The government's advocacy was not inadvertent; it reflected the universal understanding before 2005 that "crime of violence" and "sexual abuse of a minor" offenses were waivable under Section 212(c). *See also* Pet. App. 43a (government counsel conceding in February 2005 that Mr. De la Rosa "appears eligible" for relief).

Given this uniform practice, the government's suggestion that Petitioner could "have easily avoided" removal "by departing the country voluntarily at any

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analogous to the exclusion ground at section 212(a)(9)," *i.e.*, crime involving moral turpitude. *Matter of A-A-*, 20 I. & N. Dec. 492, 500-501.

point before his removal proceedings were initiated in 2004" is unfathomable. Opp. 18. In 2004, no immigration lawyer, judge, or even government lawyer would have told Petitioner that his eligibility for Section 212(c) relief depended on departing the country. The BIA and every circuit had agreed that deportable aliens need *not* depart, and the Solicitor General acquiesced in that reading of Section 212(c). Pet. 8 & n.3. The government's suggestion that Petitioner should have anticipated in 2004 that the BIA would reverse course in 2005 is untenable.[3]

The government's assertion that the statutory counterpart test is "not new" (Opp. 17) is similarly misdirected. Before 2005, the BIA consistently held that LPRs like Petitioner *satisfied* the test because their offenses had a statutory counterpart, namely "crime involving moral turpitude" (CIMT). The two deportation bases that categorically failed the test were "entry without inspection and firearms violations." Aleinikoff, Martin, & Motomura, *Immigration: Process & Policy* 703-704 (3d ed. 1995); *see also Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991).

The government weakly claims (Opp. 4) that "the analytical underpinnings of its interpretation" were found in *Komarenko* v. *INS*, 35 F.3d 432 (9th Cir. 1994), *abrogated by Abebe*, 554 F.3d 1203. The BIA did not think so; it treated LPRs deportable for "crime of violence" and "sexual abuse" offenses as eligible for Section 212(c) relief well after *Komarenko*, including in

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[3] Equally untenable is the suggestion that Petitioner's presence was "'illegal.'" Opp. 18 (quoting *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 (2006)). Petitioner entered as and remained a lawful permanent resident. Pet. App. 38a.

cases arising in the Ninth Circuit. *See Matter of Orrosquieta*, 2003 WL 23508672 (BIA Dec. 19, 2003) (San Diego); *Cardona*, 2005 WL 3709244 (Seattle). The Ninth Circuit did too. *See Cordes*, 421 F.3d at 893, 898-899.[4]

Try as the government might, it cannot rewrite history. Before 2005, LPRs in Petitioner's situation were eligible for Section 212(c) relief, as government counsel conceded in this very case. Pet. App. 43a. The BIA's later contrary ruling was an unjustified, retroactive, arbitrary and capricious "change in law."

b. As Petitioner demonstrated, the BIA's new position distinguishes between (1) deportable LPRs who traveled abroad, were readmitted, and subsequently were placed in deportation proceedings, and (2) LPRs deportable on the same charge who never departed. Pet. 25. The government admits as much when it indicates that Petitioner would have been eligible for relief had he left the country (Opp. 18), yet it points to no rational basis for treating deportable LPRs who did *not* travel abroad less favorably than deportable LPRs who did. Pet. 27; *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976); *Matter of L-*, 1 I. & N. Dec. 1, 6 (Att'y Gen. 1940) ("To require [Petitioner] to go to Canada and re-

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[4] *Komarenko* was an unremarkable application of the statutory counterpart rule to a firearms offense, namely assault with a deadly weapon under Cal. Penal Code § 245(a)(2), which is *not* an excludable CIMT. *Carr* v. *INS*, 86 F.3d 949, 951 (9th Cir. 1996). Even if Komarenko had departed, he could not have sought Section 212(c) relief. The opposite is true of Petitioner.

enter will make him no better resident of this country.").[5]

The government's response depends primarily on distorting Petitioner's contentions. The government proceeds as though Petitioner sought to be treated like an LPR who "left the United States and attempted to return" but was placed in removal proceedings "based on a charge of inadmissibility." Opp. 10. Petitioner made no such argument. Rather, the correct comparison is to "an LPR in *deportation proceedings* who had previously traveled abroad" and whose offense of conviction qualifies as a CIMT. Pet. 22 (emphasis added). Such persons are eligible for Section 212(c) relief in deportation under the longstanding *nunc pro tunc* procedure. Pet. 7-9; *see also* Pet. App. 23a (Eleventh Circuit's recognition that an LPR who "is convicted of a deportable offense, travels abroad, returns to the United States, and then is placed in deportation proceedings" is eligible under Section 212(c)).

The government's mischaracterization of Petitioner's argument is perhaps understandable, because the government would rather argue that persons who have "already been admitted to the country" may be treated differently from persons "seeking admission." Opp. 12. But that is not the issue. The challenged distinction is among *deportable* LPRs, all of whom have

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[5] The government contends (Opp. 12) that Congress's "enactment" of an "immigration provision" is constitutional if there is a "facially legitimate and bona fide reason" for it. Petitioner does not challenge any congressional "enactment," but an unconstitutional distinction created by a *BIA decision* that is inconsistent with the longstanding application of Section 212(c). Therefore, rational-basis review applies.

"already been admitted to the country." As noted, the government does not even try to articulate any rational basis for distinguishing (especially retroactively) between deportable LPRs based only on whether they previously departed the country.

The government acknowledges Petitioner's actual argument once, in a footnote (Opp. 16 n.6), and even then its response is off-point. Contrary to the government's insinuation, grants of relief *nunc pro tunc* to deportable LPRs readmitted after departure are far from extraordinary; they represent a "long-established administrative practice" reflected in numerous BIA decisions. *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 698 (BIA 1971), *aff'd*, 466 F.2d 1198 (9th Cir. 1972); *see also Matter of K-*, 9 I. & N. Dec. 585, 586 (BIA 1962); *Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956); *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1954); *Hernandez-Casillas*, 20 I. & N. Dec. at 284 n.6 (refusing to overrule *G-A-* and *S-*). The government cites no case in which a deportable LPR's case was held insufficiently "extraordinary" for Section 212(c) relief *nunc pro tunc*.[6]

The government's suggestion that an equal protection claim fails unless the LPR can identify an inadmissibility subsection containing "similar language" to his deportation subsection (Opp. 3, 15) is baseless. An equal protection challenge to a governmental distinction (prior travel) that appears nowhere in the relevant statute (Section 212(c)) cannot be defeated by pointing

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[6] Nor was the LPR in *L-* "deported and subsequently reentering" (Opp. 16 n.6 (quotation marks omitted)); he voluntarily traveled to Yugoslavia, was readmitted on a reentry permit, and later received relief *nunc pro tunc* in deportation proceedings. 1 I. & N. Dec. at 4-6.

to semantic variations in completely *different* statutory subsections (the inadmissibility provisions of Section 212(a) and the deportability provisions of Section 237). As the Second Circuit reasoned, the government's "emphasis on similar language is strange." *Blake* v. *Carbone*, 489 F.3d 88, 102 (2d Cir. 2007). Congress plainly did not draft Section 212(a) and Section 237 on the theory that discrepancies in their terminology would determine the availability of relief under Section 212(c).

Nor is it an answer that Petitioner is "not being treated any differently from other aliens" denied relief under *Blake* (Opp. 16; *accord* Opp. i), any more than discrimination against red-headed people could be defended by pointing out that all redheads were treated alike. The government "cannot deflect an equal protection challenge by observing that ... all those within the burdened class are similarly situated. The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps." *Williams* v. *Vermont*, 472 U.S. 14, 27 (1985); *see also Rinaldi* v. *Yeager*, 384 U.S. 305, 308-309 (1966) (equal protection "imposes a requirement of some rationality in the nature of the class singled out").

The government cites the Ninth Circuit's now-abrogated decision in *Komarenko* as "persuasive." Opp. 13. The relative persuasiveness of the circuits' differing views is the very issue this Court should resolve on certiorari. For now, it suffices to note that Komarenko's offense was not held to be a CIMT and, accordingly, raised a different equal protection issue, as the government recognizes. *Id.* (*Komarenko* considered whether "two groups of aliens *convicted of different crimes*" were similarly situated (emphasis added)). That analysis is irrelevant to this case, which involves the BIA's decision to treat deportable LPRs convicted

of the *same crime* and deportable under the *same charge* differently depending on whether the LPR previously left the country.

The Second Circuit addressed that very question and answered it correctly. It did not require consideration of "the facts" of particular cases (Opp. 19); the BIA need only determine whether an LPR's statutory offense is a CIMT as well as an aggravated felony. *Blake* v. *Carbone*, 489 F.3d at 105. Nor did the Second Circuit "vastly overstep" the judicial role. Opp. 14 (quotation marks omitted). Federal courts, including this Court, routinely review agency determinations that an offense is a CIMT. *E.g.*, *Jordan* v. *De George*, 341 U.S. 223, 223-224, 232 (1951) ("conspiracy to defraud the United States of taxes on distilled spirits" is a CIMT). Often, as here, the issue is not even disputed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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